2025 Michigan Appellate Bench Bar Conference Summary Report

The Bench Bar Conference Committee is pleased to present the 2025 Michigan Appellate Bench Bar Summary Report.

The conference began with an interactive plenary panel session on practice and procedures in the Michigan Court of Appeals. 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 a presentation on A.I. from Ross Guberman of Legal Writing Pro LLC. The afternoon kicked off with breakout sessions on various substantive issues relating to such topics as writing persuasive briefs, applications for leave to appeal, stays on appeal, effective oral argument, and avoiding filing mistakes. 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 Court of Appeals Chief Judge Elizabeth Gleicher was presented with the State Bar Appellate Practice Section's Lifetime Achievement Award.

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

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.

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II. Breakout Sessions: Court of Appeals Practice and Procedures: What You Don't Know Can Kill You(r Appeal)

A. Breakout Room 1

1. Takeaways from plenary session

- The importance of updating your research/briefs before oral argument to ensure you have the most recent/up-to-date case law
    - This includes published opinions from other states, which can be helpful for the panel
- The Commissioners are very friendly and can provide critical information for your case and how to go about filings
    - Sometimes they can get issues to judges even if there is no "formal" way of doing that

2. Other discussion points

- You can submit a motion to submit supplemental authority that is unpublished
- Recognize that prehearing attorneys who review the cases first are often less experienced and don't have the same grasp on the record as you do, so it's important to know everything well for oral argument to correct any errors
- There can sometimes be inconsistencies between districts on how certain rules are executed
- One frustration from some of the practitioners was the inability to directly reach a person when calling the clerk's office
    - However, everyone recognized that if you leave a detailed message, the clerks will listen to it, discuss it as appropriate, and respond and address the issue
- The length of time from initiation of appeal to decision is difficult for clients to understand but there are valid reasons for why it takes so long, such as getting transcripts, records, etc.

- This can be particularly difficult for criminal clients with shorter sentences because often it doesn't assist them by the time the appeal is over

- In addition to reviewing the IOPs, practitioners may want to consider reviewing the pro per guidelines, which can provide helpful information for appeals as well

    - There is one for civil and one for criminal

3. There was an extensive discussion about certain record issues

- Transcripts – if you can't get a transcript at all or can't get it in a timely manner, one option is to use stipulated facts

- Trial exhibits – the judges indicated that it would be helpful for practitioners to keep copies of exhibits and exhibit logs and even to file those with the circuit court (also file deposition transcripts if they are read into the record)

    - This includes ones that are excluded so they can be properly considered on appeal

- Filing electronic video/audio – practitioners should call the clerk's office to determine the best way for filing the media with the clerk

4. Proposed suggestions/rule changes

Several practitioners suggested that it would be beneficial to figure out how to speed up decisions for criminal cases with shorter sentences and detention appeals for juvenile cases.

- One suggestion was to put these cases on summary panels to fast-track the decisions – i.e. a faster briefing schedule and no oral argument

    - However, practitioners who dealt with summary panels in the past tended to not like them because of limited briefing and lack of oral argument and because important legal issues were being given short shrift

- Another suggestion was to change the Michigan Court Rules to add these types of cases on the priority list

One practitioner suggested that it could be worthwhile to have the cost of a motion fee taken out of the transcript costs if you have to file a motion for show cause for the transcripts.

B. Breakout Room 2

1. Clarity on Final Orders and Jurisdiction Issues

- **Rule Ambiguity:** The language regarding the determination of a "final order or judgment" for a claim of appeal in the court rules is not clear and is difficult for court staff to decipher (See MCR 7.202(6)). This lack of clarity is particularly noticed in abuse and neglect cases.

- **Addressing Ambiguity (The Bench):** The Michigan Supreme Court is already planning on looking at MCR 7.202(6), and an Administrative Order will be opened for comment to address the issue, including forming a work group for clarification. As a general note, Practitioners are encouraged to send a letter to the Justices about any ambiguity in the court rules, so it is brought to their attention.

- **Addressing Ambiguity (Practitioner Best Practices):** Practitioners should provide clarification in their briefs explaining why they believe they have jurisdiction, especially when it is arguable.

- **Court Handling of Jurisdiction:** The court generally tries to take a "light touch" to jurisdictional issues; blatant lack of jurisdiction may result in dismissal, but questionable issues are allowed to proceed.

- **Filing Strategy:** If a practitioner's claim of appeal is dismissed for lack of jurisdiction, they can file a motion for reconsideration regarding the dismissal. For questionable cases, the court prefers that you don’t file a claim of appeal and an application for leave to appeal. The court advised that calling the clerk's office beforehand may help all parties.

- **Docketing Issues:** Confusion exists regarding whether to rely on the date the order was signed by the judge or the date the order was served on the parties (MCR 2.602) for calculating appeal time, as a judge may sign an order that sits on their desk before being uploaded. This situation "kills the appeal time frame". This is an issue to bring to the MSC’s attention.

- **Systemic Uniformity:** There are 55 docketing systems across the state, and a unified case management system is currently in process.

2. Record Management and Exhibit Submission

- **Trial Exhibits:** The Court of Appeals does not automatically receive trial exhibits; practitioners must provide direction on where to find these items within their briefs.

- **Missing or Conflicting Records:** A gray area exists concerning what to do with trial exhibits, contributing to a lack of integrity in court files. This issue has also

led to problems where trial transcripts are unclear about what exhibit was actually played to the jury.

- **Technology for Records:** A more centralized Register of Actions that uploads all trial exhibits would be helpful, though confidentiality concerns (e.g., family law issues) would need to be addressed. Technology is available for digitizing exhibits and housing them securely via shared files and practitioners would be interested in seeing something similar to Pacer.

- **Submitting Digital Media:** For audio files, practitioners should work with the clerk's office and opposing counsel. The court has software that can convert files submitted via a thumb drive or disc into an MP4 and upload it to the court's file management system.

- **Brief and Appendix Best Practices:** Practitioners should include as much as possible when working with a trial court that lacks electronic filing. For digital review, Bate stamping and linking something in the PDF to the appendix are helpful to the court.

3. Effective Advocacy and Practice Tips

- **Judicial Perspective:** Judges have many cases, and practitioners must cut down arguments to the "critical issue". Write, present, and prepare for anyone to read, as COA panel assignments and opinion authors are random (meaning a specialist might not draft the final opinion).

- **Amicus Briefs:** Judges love amicus briefs because they help explain why things matter to the community at large and can remove the hyper technical aspects of the case to focus on its overall impact.

- **MSC Strategy:** When asking the MSC to take action, practitioners should not "be shy" about why the MSC should grant leave. When dealing with *stare decisis* analysis, practitioners should be prepared to respond to anyone who pitches that argument.

  Formatting: Filings should be easily recognizable, as the docketing staff are non-attorneys, and captions should be correct.

C. Breakout Room 3

1. Final Orders

- **Overview:**
  - Attorneys shared their experiences and challenges with determining whether an order is a final order.

- **Key Topics Covered:**
    - Receiving an appeal that the appellant filed as of right but should have filed as an application for leave to appeal because the order was not final.
    - Determining if an order is a final order, whether or not the lower court called it a final order.
- **Practical Strategies:**
    - If an appellant files a claim of appeal as of right when they should have filed an application, there are various options:
        - File a motion to dismiss based on lack of jurisdiction.
        - Address the jurisdictional issue in the statement of jurisdiction.
            - Court personnel noted this is very important because it could trigger a jurisdictional memo.
        - Raise the jurisdictional issue at oral argument.
            - But note that the court has the authority to treat a claim of appeal as an application and the court has discretion to convert to an application.
            - By the time it reaches the judges, the substantive issues are there, and the court may want to rule on the substantive issues.
    - Some attorneys stated that they are agreeable to treating a claim of appeal as an application so the court can issue a decision on the substantive issue.
    - As a best practice, if the goal is to achieve a dismissal, the attorney should address jurisdiction as early as possible by filing a motion to dismiss.
- **Follow-Up Actions:**
    - The group suggested a change to the court rule so that a party filing a successful motion to dismiss on jurisdictional grounds can receive a refund of the motion fee.
    - Alternatively, the court rule could be clarified so a party can tax costs if the party is successful on a motion to dismiss based on jurisdictional grounds.

2. Division of labor between clerk and commissioner

- **Overview:**
    - Attorneys shared experiences contacting the clerk's and commissioner's office.

- **Key Topics Covered:**
  - Attorneys discussed when it is appropriate to call the clerk's office and when it is appropriate to call the commissioner's office; however, the delineation is not always clear.
  - Most attorneys in the group have called the clerk's office; fewer have called the commissioner's office.
- **Practical Strategies:**
  - Attorneys suggested they will call the commissioner's office if there is something unusual but will contact the clerk with procedural questions.
  - General takeaway: call the court with something unusual or emergency, and the court can generally direct you to the right division.
- **Follow-up Actions:**
  - Court website or IOPs could clarify when an attorney should call the clerk's office and when attorney should call the commissioner's office.
  - Attorneys agreed it is reassuring when they can talk to a person and do not have to leave a message.

3. Record on appeal

- **Overview:**
  - Attorneys discussed the record on appeal, including challenges obtaining a complete transcript, and the best practices for filing an appendix.
- **Key Topics Covered:**
  - Incomplete record.
  - Judges' access to physical and electronic records.
  - Filing documents under seal.
  - Handling court reporters who file incomplete or late transcripts.
- **Practical Strategies:**
  - If the record is incomplete, it was suggested to call the clerk's office so the clerk's office is aware.
  - If the record is physical, only the authoring judge receives a copy of the record.
  - Media exhibits – it is best to file a physical copy via a CD/DVD or flash drive. Because of security concerns, court personnel cannot open links.
    - The court only needs one copy of the media exhibit.
  - In the appendix, bookmarking is very important. The size of the appendix matters less if it is easily navigable.

- Sometimes it is helpful to include two appendices:
    - For large exhibits (such as transcripts), the practitioner can include one appendix for abridged documents and one appendix for unabridged documents.
    - A second appendix may also be helpful when exhibits were filed under seal – one for documents publicly filed, and the other for documents filed under seal.
- In an application for leave to appeal, make sure to include a thorough appendix because the court will not receive the record below.
- Ultimate goal is to make sure judges have what they need to fully understand case and issue opinion.
- With respect to transcripts, if the attorney does not obtain the transcript or the transcript is incomplete, it was suggested as a first step to call the court.
    - When a transcript is incomplete, it may be possible to get a backup video or audio recording, but that varies by courtroom.
    - Some attorneys have experienced a court reporter signing a certificate saying there is no recording, to later discover there was a backup recording. The court reporter can then create a transcript based on the backup recording.

- **Follow-up Actions:**
    - Advance the court's technology to make it easier to provide media copies to the court (send a link, link in the brief, etc.)
    - In the long term, move to a system similar to federal courts where you can link to a specific page.
    - With respect to incomplete transcripts, the group discussed a change to the court rule requiring the court reporter to certify that he or she has exhausted all backups before filing a certificate with the court.

4. Internal Operating Procedures

- **Overview:**
    - Attorneys discussed the frequency and purposes for consulting the IOPs.
- **Key Topics Covered:**
    - Most attorneys have used the IOPs. The primary uses:
        - The IOPs clarify the court rules without having to ask questions of the clerk.
        - The IOPs complete the gaps in the court rules.
- **Practical Strategies:**

- Because the IOPs follow the same numbering as the court rules, it is easy to locate the relevant IOPs when questions arise.
- Attorneys also appreciate that the IOPs are easily navigable.

- **Follow-up Actions:**
  - The group discussed IOPs that would be useful:
    - Handling remand orders – sometimes it is unclear the scope of remand, particularly if the Court of Appeals or Supreme Court has retained jurisdiction
    - Conflict/unavailability issues: the group expressed concern that the COA will not honor unavailability in back-to-back months.
      - Attorneys in solo practice were concerned about medical, parental, or disability leave
      - Can attorneys explain that they are notifying of unavailability because of a medical issue and not because of vacation?
      - Attorneys recognized that it makes sense the clerk's office will not entertain intentional delays.

5. Requests to publish opinions

- **Overview:**
  - Attorneys shared their experiences requesting publication of opinions, both before and after the court issues its opinion.
- **Key Topics Covered:**
  - Rate of success in seeking publication both before and after the court issues an opinion.
    - Based on the experience of the attorneys in this breakout session, attorneys recognized that the odds are against publication if the attorney requests publication after the opinion is issued.
    - Court personnel and the judiciary expressed appreciation when an attorney explains why publication is important before the court issues an opinion.
    - Publication of an opinion may also impact how the opinion is drafted, so it is preferable for the court to know in advance if publication is necessary.
    - After a decision is issued, the panel must unanimously agree to publish the opinion. However, before the opinion is issued, only one judge is required to decide an opinion should be published.
  - The group also discussed per curiam and authored opinions

        - By court rule, an unpublished opinion cannot be authored.
        - Some published opinions are issued per curiam. This is usually because there is a lot of collaboration and all judges were involved in drafting the opinion.
        - Opinions are often pre-circulated and at that point it can be determined if the opinion is authored or per curiam.
    - **Practical Strategies:**
        - If an attorney seeks a published opinion, as a best practice, the attorney should request it before the opinion is issued.
    - **Follow-up Actions:**
        - Some attorneys expressed that they would like to see authored unpublished opinions, which would require a change to the court rule.

D. Breakout Room 4

1. Longer COA opinions

During the morning panel presentation, it was mentioned that Court of Appeals decisions have gotten longer over time.

Several Court of Appeals judges during this plenary breakout session stated that this is due to several different factors, including: (1) an increased access to case law; (2) judges wanting to explain their position better; (3) longer appellate briefs, and (4) multiple issues within one brief.

Many participants appreciate the longer appellate opinions, as it helps clients understand the Court's position better.

One issue participants expressed frustration with was the Court of Appeal panels' inconsistent handling of preserved versus unpreserved issues. Some panels will address unpreserved issues, while other do not. Attorneys would like to see more consistency with this issue.

2. Appendix and citations to the record

The Court of Appeals judges in attendance emphasized the importance of attaching important documents to the appendix of a brief, and to not make a judge dig through the record for material evidence.

Some judges will bookmark certain documents themselves.

An abbreviation table in the appendix can be very helpful, as is pointing to a specific location of document in the lower court record for less material documents (i.e. "attached below as Exhibit A to defendant's MSD").

Most motions, such as a motion to remand, likely will go to a different panel. Therefore, practitioners should attach all the documents to the motion, even if those documents are attached to the appendix of the brief.

3. Jurisdiction

There are far less jurisdiction issues in the Court of Appeals with respect to criminal cases compared to civil cases.

In civil cases, where Court of Appeals jurisdiction is unclear (i.e. whether an order is a final order), practitioners are advised to file a claim of appeal and an application for leave to appeal.

Sometimes appellees do not really flag jurisdictional issues, possibly because they have no issues with the merits of the issue being decided at that time.

E. Breakout Room 5

1. Use of Artificial Intelligence

- Growing up, a lot of fear surrounding the topic largely due to media influence.
- How is the court approaching the use of AI, internally and externally?
    - Difficult to unpack AI as a single concept. Use by the court, for instance, will vary wildly from use by practitioners.
    - Court use for cataloging briefs and bringing issues to the forefront is being emphasized.
    - Further, clerks using AI to kick out a report.
    - Will this replace law clerks? Maybe, but not for a very long time (100 years hypothesized)
    - Will this replace the courts or judges? Unlikely.
    - How can legal professionals incorporate AI into opinion writing?
        - Its use is frequent, but despite this, courts seem to focus on using it as a research tool and indexing tool, instead.
    - Cost impact
        - The court is probably looking at a quarter million dollars per year for the number of licenses that would be needed. This may not be the case for all attorneys, but larger firms are likely looking at a half million dollars.

- Use in writing
    - Lawyers are not given points, very often, for original thought. In fact, it's often frowned upon. Does this mean that the use of AI to improve writing could be beneficial now?
- Concern in mistakes made by AI
    - Famous stories surrounding AI making up cases that don't exist.
    - It might save time to put a brief or section of a brief together, but everything should always be checked. Primary reason that lawyers will likely never be completely replaced by AI technology.
- Use of AI to make a better record to provide to the appellate courts?
    - Kent County, it is believed, replaced its court recorders with video-only technology. This is not considered favorable, and is a good example of how this would be problematic.
- How are practitioners using AI in their practice?
    - Summarizing MSC opinions
    - Instructing ChatGPT "not to hallucinate." Lots of prompts and instructions help in ensuring that quality work comes out of its use.
    - Variety of opinions held in room – some are large proponents of AI's use, while others don't use it at all. Those who don't use it at all know that it may take longer to do some work, but they know that their work is their own and of a quality that they are happy with. Those who are large proponents of AI's use seem to think of it as a useful tool, and they believe that failing to do so will have them left behind and considered far less efficient.
        - Those who do not use it stated that they don't understand it. It's not necessarily that they're against its use.
        - Some also lack the bandwidth or capacity to learn this new tool's use on their own, individually or as a corporation/agency/organization.
    - Asking queries such as, "What has Judge Smith said about XYZ in their former opinions?" Then doing so for all judges on the panel of your case.
    - Asking for two-page summaries of a case for quick use at oral argument.

- Considering it an "iterative device." Using it as a tool to outline to help get things started, but which itself is not the work product.

- Hallucinations
  - Many people's biggest fear in using AI.
  - How responsible is an attorney for submitting work product containing hallucinations?
    - 100%
  - What is an appropriate penalty to this?
    - Proposed that an AI hallucination and an associate hallucination are largely the same thing.
    - Alternatively, use of AI could increase the sheer volume of these sorts of mistakes. Would a penalty be necessary to deter this kind of poor workmanship.
    - Courts have sanctioned lawyers for blatant lies, regardless of the source. Even giving attorneys the opportunity to come clean, or to double-check the record, if attorneys double down on the lie, whether it came from themselves, an associate, or AI. This is, of course, a continuum – an enormous amount of the practice of law is differences in interpretation of what a case stands for.

- Privacy
  - AI learns from previous input from across its entire use. How much does that affect the use of generative AI when it comes to inputting client's or litigants' private information?
    - It affects it enormously. Some firms have policies that restrict the amount of information you give to the AI so that no personal, sensitive, or confidential information can be input.
    - Some discussion about custom GPTs being closed source, but general consensus that even this should not happen, because you cannot know for certain that the information is not being used somehow in ways it should not be.

- Development of skills
    - Emphasized that it is a tool, and a practitioner can only get good at using this tool by using it.
- Ultimate consensus: use of AI as a tool is fine, provided that the legal professionals are still in the driver's seat. Some individuals still took the perspective that they will not use AI in their practice.

2. Looking back to the plenary session, "What You Don't Know Can Kill You(r Appeal)", what are the biggest issues that can kill a case?

- Not providing clerks what they ask for when they reach out to indicate that something is missing, whether it is a title page, certain appendix information, etc. This will often lead to the clerks marking the brief as "defected."
- At oral argument, cut to the chase. Often, attorneys spend too long belaboring facts that are contained in the brief, but this is often a waste of time.
- Too many issues being raised – if you have two good issues, and four mediocre or poor issues, it does not help a client to push forward the poor arguments.
- Ensure that the brief is of the best quality it can be. At oral argument, the opinion is already written, or mostly already written. Do not assume that oral argument will be the winning point of a case.
- It aggravates the court when the litigants make the arguments personal.
- It also aggravates the court, and various counsel present, when multiple issues are included in a single question presented.
- Don't lose track of the notion that attorneys should be informing or educating the judge on unique issues. At oral argument, don't start talking back and forth between counsel tables, what matters is that you're talking to the judge and trying to educate them on something that they may not know about.
- When the judge starts talking at oral argument, stop talking. It doesn't matter if you're in the middle of a sentence. Shut up. What is most important in that situation is what the judge thinks, not what you think, so you're there to hear their thoughts and answer their questions.

F. Breakout Room 6

1. Preferred fonts

- The vast majority preferred either Times New Roman, Century Schoolbook, or Garamond.

2. Use of artificial intelligence in practice

- Many attorneys reported that they have used artificial intelligence to help narrow large universes of documents for review during discovery.

- Other attorneys mentioned that they have used artificial intelligence to prepare relatively simple pretrial materials, such as voir dire questions.

- One attorney mentioned that they had used artificial intelligence for more substantive work, such as witness outlines, and that the work product was surprisingly useful.

- Finally, attorneys reported that artificial intelligence has helped them create blog posts and other marketing materials. Finally, attorneys reported that they have used artificial intelligence to transcribe meetings or interviews, with varying degrees of success in terms of accuracy.

- During the course of this discussion, many attorneys expressed reservations about using artificial intelligence to review or analyze sealed materials or materials subject to attorney-client privilege. Members of the group then pointed out that, while some artificial intelligence platforms are open source, others can be "locked down" to a closed universe (usually in exchange for a subscription fee), which lessens concerns about the use of confidential materials.

3. Use of artificial intelligence by the courts

- Court personnel reported that courts have been using artificial intelligence to help with clerical tasks such as docketing, which has aided efficiency.

- They also reported that the court has been using artificial intelligence to provide initial assessments of appeals based on the AI's review of the briefs.

- In response to this, at least one attorney raised a concern about the program's ability to review the factual record before making a preliminary assessment that would then anchor the opinion of the reader. The court personnel responded that the program did review the underlying record, and usually did a fairly good job of separating fact from fiction.

4. Errors in court transcripts in the age of Zoom

- Court personnel indicated that zoom hearings can prove particularly difficult to record for court reporters, given issues with lag and persons talking over each other.

- Someone suggested that having a person in the court room saying "slow down" or "stop talking" might help the issue.

- Another member of the group indicated that certain courts will supply the underlying zoom video to help correct errors in the transcript.

5. Plans for a unified case management system, under which all courts would have e-filing

- Court personnel reported that the hope was to have a unified system within the next five years.

6. Making appellate filings available online

- Court personnel reported that discussion of that particular issue had been tabled internally for the time being, due to the administrative difficulties of scrubbing confidential private personal information (PPI), such as victim information.

- Court personnel added, however, that if one is writing an amicus brief, one can ask clerks for documents and will often receive them free of charge.

G. Breakout Room 7

1. Difficulties in determining "final order or judgment" for a claim of appeal – best practices for how to proceed?

- Don't trust the clerk's office to do it for you.
- Some judges are entering orders on "Scheduling Order" forms, which is creating confusion, especially for more junior attorneys.
  - Experience with this in both criminal (Kalamazoo County) and family law contexts (Wayne County).
  - If a defense attorney is unsure about local practices, contact the prosecutor's office.
- Courts should not use "Scheduling Orders" to enter substantive orders.

2. Have you ever filed a motion seeking a determination from the Court regarding jurisdiction?

- Two participants have.
- If it's not clear that the Court lacks jurisdiction, it will leave it to a party to raise the issue.

3. Have you ever had a situation where you called the clerk's office and/or a commissioner regarding an issue that arose in your appeal? If so, how was the issue resolved? What did you learn from the experience?

- Clerk's office is always very helpful and nice
- Some participants didn't realize they could contact the commissioner.
  - Clerks can answer most questions, but if there's something specific about the case or needs a resolution (e.g. extension), clerks will pass you along to the commissioner.
- *Have you ever had a situation where the clerk/commissioner was unable to answer your question or resolve the issue?* No.

4. Have you ever filed a motion to clarify the court rules? No.

5. Have you ever filed a motion to clarify an opinion?

- One participant filed a motion that was half reconsideration-half "can you clarify this if you don't grant reconsideration".
- Another participant had a situation where a defendant filed a motion to remand for 12 different reasons, and the remand order was granted without clarifying which basis for remand.

6. How do you address issues with respect to the record on appeal?

- It would be great if ROAs included links to the documents like federal court dockets do.
- One participant had an issue where a resentencing hearing happened but the ROA didn't properly reflect the hearing. It took a lot of time and effort to get transcript of the hearing.
- Oakland County – prosecutors are often getting requests from defense appellate attorneys coming to them for the record, they should be trying to get it from trial counsel first. Defense attorneys say they often get ignored by trial counsel. (Sometimes trial counsel won't help because they know they might get an IATC claim on appeal.) Defense attorneys say they only contact the prosecutor's office as a last resort. Oakland County's perspective is that the requests are coming in too quickly to have been made after making an effort to get the record from trial counsel.
- Attorneys should be able to access material out-of-court reporter is using to draft the transcript so they confirm accuracy. Some reporters are known to fabricate.
  - If you think your transcript isn't accurate, you need to file a formal complaint. Committee is meticulous about investigating complaints.

Does our name get attached to the complaint? Yes. Concern is that we have to work with these people.

- A lot of participants have had to reconstruct the record. Old cases, bench conferences not getting recorded because the microphone wasn't on. During Covid, a lot of judges would forget to hit the record button. There's a court rule to settle the record. Everyone hates that process.
  - Helpful when judge summarizes a bench conference on the record before the jury comes back in.
  - If you think it's noteworthy enough, summarize it on the record after it's done. Make sure to memorialize it. But sometimes people forget, and it's hard to recreate after-the-fact.
- Getting the exhibits to the COA:
  - This is another area where the court rules don't match practice. Court rules require the exhibits to be filed with the circuit court, and the circuit court doesn't want them and won't accept them. So the prosecutor's office will provide copies to the defense appellate attorney on request. They won't file them in the trial court and don't file them with the COA.
  - Video: put it on a flash drive and mail it to the court. Put a slipsheet in the appendix identifying it and indicating that it's being mailed separately.

7. Best practices for the appendix on appeal?

- Bookmark the appendix.
- Feedback: we shouldn't have to renumber transcript pages, it's so laborious.
- COA won't defect for failing to include appendix citations.

H. Breakout Room 8

1. What to do when a final order seems unclear?

- File an appeal right away. Avoid waiver/forfeiture.
- If necessary, file another appeal when a final order is entered. The Court will consolidate when appropriate.

2. Motions regarding jurisdiction?

- Rare, but the Court would deal with it like any other motion
- More common in certain contexts for collateral order doctrine

3. When to call commissioners' office?

- The Court staff in attendance encouraged practitioners to call the commissioners office when there are questions regarding deadlines. Although the Court cannot

give legal advice, they are generally willing to answer questions that can arise regarding transcript delays.

- The commissioners office is also generally willing to assist when practitioners are contending with emergency situations that require expedited briefing. The Court staff discussed examples related to recent election cases, seeking to accommodate practitioners as much as possible while being cognizant of the ultimate election date.

4. What is truly an emergency?

- Practitioners and jurists exchanged recollections of prior instances of both true emergencies as well as exaggerations. The Court will do its best to accommodate all parties and counsel but is unable to accommodate all requests.
- The claim that an issue involves an emergency seems to be on the rise, especially regarding privileged information, contempt proceedings, and trials.
- Practitioners are encouraged to indicate with a footnote or asterisk on the cover of the brief/motion as to the reason for the emergency.
- Motions for immediate consideration leapfrog most other applications when included with an application for leave to review to Court of Appeals. Attendees discussed the pros and cons of this process, since motions for immediate consideration are included with so many applications for leave to appeal.

5. What to do about Missing or Delayed Transcripts?

- Work with the trial court/court reporter to determine if there is any recording available.
- Work with opposing counsel to stipulate regarding the record.
- If a court reporter or trial court will not produce a timely transcript, consider filing a motion to show cause first in the trial court then in Court of Appeals.

6. How to handle Video exhibits?

- Jurists appreciate the trend of more cases having video exhibits, helpful for a variety of claims including civil rights and personal injury.
- However, issues have arisen with video compatibility. Courts are limited to the tools provided by vendors, but jurists are cognizant of proprietary video formats designed to prevent tampering or editing.
- There was a consensus to consider whether Court IT services could put instructions online regarding the types of video formats the Court is best equipped to receive as well as instructions on how to provide proprietary video playback software to the Court as needed (for dashcams, bodycams, etc.).

7. What to include in the Appendix?

- Practitioners are encouraged and reminded to include/attach all exhibits that are referred to in the trail court motion. The Court of Appeals receives the full record

when there is an appeal by right, but appeals by leave are limited to the exhibits included with the at-issue motion and response.

- The Court has specific rules regarding the construction of the appendix, but there is no limit on how large the appendix can be. The preferences is to include full copies of transcripts as exhibits rather than just the key pages, in case the other portions are needed for context. If a trial court limits the size of exhibits, consider filing an appendix in the trial court.
- The judges have the appendix available to them during oral argument. Practitioners are encourage to reference appendix pagination during argument to make it easy for panelists to find referenced documents.

8. Court operations

- Practitioners are remined that the Court of Appeals Internal Operating Procedures (IOPs) are a helpful resource to understand how particular issues are addressed by the Court.
- Additionally, the Michigan Supreme Court administrative counsel is available to assist when issues arise regarding Court Rules.

9. Succinct writing is always appreciated

- Attendees recalled instances where litigants raised dozens of issues on appeal and generally agreed that the highest quality appeals generally only have one or two (sometimes three) true issues. Focusing on the decisive issues makes for clearer writing.
- Attendees also discussed various methods for refining the writing process and how that can be used to aid in preparation for oral argument. Oral argument should build off of the brief not merely repeat the arguments already made. Succinct writing will allow oral argument to focus on the points that matter.
- Practitioners are also reminded that that the Court of Appeals and Supreme Court receive a very large volume of filings every year and have limited resources.

10. Oral argument

- Court of Appeals jurists prefer practitioners to ask the panel if they have questions, and then get to the important issues. The panel will know the facts from reviewing the briefs in addition to the reports created by Court staff.
- Supreme Court oral argument is considerably different from the Court of Appeals. Question format depends on whether the argument is in person or remote/zoom. The methodology has changed due to pandemic but continues to evolve. The type of argument (hot vs. cold panel) depends on the issue and facts involved, but generally a case will not get to the Supreme Court unless there are weighty issues.
- Attendees discussed the MOAA process as well. The general consensus is that oral argument is beneficial at the Supreme Court, perhaps more so than at the Court of Appeals.

I. Breakout Room 9

1. Identifying a final judgment

- When a judgment of divorce decides all but one issue – child support – and includes an FOC *referral* for child support, it is not final until the support order is issued, which could be many months later. Creates problems with appealing the custody portion of the judgment which is final and also time sensitive. Note: MCR 3.211(D)(2)(b) (reserving spousal support is considered part of a final judgment, see below)
- Including language from the court rule that this is a final order doesn't automatically make it a final order appealable by right.
- Incomplete judgments in civil cases
    - A premature judgment: After a jury trail the attorney forgot to enter order to dismiss a party so technically it was not a final order and COA rejected jurisdiction requiring filing of a delayed app. Eventually entered the stipulated order of dismissal but long after original entry. Question: the entry of that order would have technically created a final judgment at that point. Again however, creates delay.
- Issue when the trial court extends time to file motion for reconsideration for the other party. That doesn't affect appeal timing.
- Possible solution
    - Clarify the final order rule, especially in domestic relations matters

2. Filing delayed applications

- Many delayed apps are filed because the attorney waits for transcript to be sure of the basis for the appeal. In domestic relations cases, which are often fact heavy this takes time.
- Multi-party litigation (20 plaintiffs). Sorting through to determine if and what is the final order is onerous. Including the need to determine whether the status of all parties was addressed.
    - While it may be possible to research the record to locate orders re each party, the docket often only provides "order entered" without any detail.

3. Jurisdictional orders

- Example: A judgment of divorce was entered <u>after trial</u>, but the consent language remained in the order and COA denied claim because consents are not appealable by right.
    - Solution: Filed motion for recon with COA to explain that language of order isn't dispositive.
- Example: Spousal support reserved in final judgment is still a final order because it's an option under the statute, although there has been inconsistent treatment by the appellate courts. MCR 3.211(D)(2)(b).
- Possible solutions

- Provide access to all the files so attorneys may review for consistency between offices especially on jurisdiction issue. But, this is a time-consuming process for the court.
- LEXIS may have a broader library of orders at least in criminal orders than West law.
- The difficulty is that is orders don't always include factual basis and background.

4. All participants have called the court of appeals with questions

- All agreed the staff are courteous and helpful.
- Example: Attorney filed a reply brief, but the PDF was corrupted. When they called, the court provided direction and recommended they. include cover letter with the refiled brief explaining the reason to refile.
- Was the staff unable to help or gave an unacceptable response?
  - Example: Attorney filed a motion for guidance in a criminal case because one COA office had a process different from another. The question was whether they had a claim while waiting for resentencing. The attorney did not agree with the response and filed motion for guidance.
  - Note – there are issues with consistency in terms of dismissing claims of appeal as premature.

5. Motion to clarify court rules

- See above examples
- Example: The COA rule that amicus briefs are due 21 days after the appellee brief. But what's the deadline when the appellee fails to fail a brief? In general, the COA provides that the brief would be due 21 days after appellee brief was due.
- A related issue is when there are multiple appellees. The attorney here filed a motion to file response after last appellee's brief. No response yet.

6. Transcript Issues

- Court reporter hasn't filed the transcripts, so COA notifies appellant who wants to avoid show cause.
- Usually calling reporter resolves the issue, but it's time consuming for the attorney (especially those without assistants) and is happening more and more often.
- One issue may be pay rate for reporters, although the statutory rate was recently raised. But cost is a barrier to many appellants especially in family and criminal matters. These are families.
- This seems to be a big problem in Wayne County (but other counties are also involved). It also makes it harder for courts to find court appointed attorneys to take cases.

- Example: In one county attorney was told to pick a court reporter and after speaking to several learned that was not the process in criminal appeals
- Possible (but not ideal) solutions:
    - Call the court reporter. But it becomes time consuming to call the reporter over and over, especially sole practitioners without assistants.
    - Some attorneys have visited the reporter's office to get a response.
    - Some have called supervisors to shake loose a transcript.
    - Courts could move from live reporters to recording all proceedings, as in the new Wayne County court. But that creates new problems – hearings aren't recorded or are misplaced and there may be an extensive process locating the hearing recording.
    - COA said file a correspondence that you are actively trying to locate records, and they will assist. COA tries not to dismiss cases for transcript reason.

7. Registers of Actions may also be unclear.

- Requires a call to the court to review records.
- Examples:
    - Case re-called but not listed on the register.
        - ROA says, "adjourned to DATE" and that date is blank.
        - Reporter filed affidavit that was no transcript, but attorneys knew there was. Had to file motion to settle record but then recording was found.
        - If transcripts are not located, the attorneys must agree to what occurred at the hearing or file a motion. For one attorney, agreement happened only once. There is a court rule process.
        - Especially hard for older transcripts, which may also require an order to settle the record. Example: requirement to resentence in criminal cases.
    - Solution: Uniform statewide register of action format

8. Exhibits

- Court rule requires trial court to return exhibits to the parties. Appellate attorney must track them down from the parties which can be a challenge.
- Some judges limit the number of pages allowed to be attached as exhibits (one to 20) and requires a motion to file more. No court rule permits this limitation.
    - Possible solution: efile everything you would normally file and then limit pages in hard copy to judge.
- Video or other media. No uniform way to get it into the record. Often requires a call to the judge to find out how to submit it and then how to get to the COA on appeal.
    - Call COA and they'll tell you, often send a thumb drive.

    - Example: body cam recording and COA told appellee they need to produce it because it was in their brief and he objected because he's not the appellant.
    - Letters from COA that failure to submit will lead to all related issues being waived.
- Appointed counsel in criminal cases must get them from the parties and determine who in the prosecutor's office to contact. Then the next issue is how to get them to the COA.
- Determining which videos or parts of videos were admitted may be difficult.

9. Issues not covered by court rules or IOPs

- When a 2nd motion is required related to the first, does it go to the same panel as 1st motion depending on whether it was filed in the same month or the next month, when the motion panel changes.
    - In one case it went to same panel, in another to the new month's panel
    - Folks have seen it go both ways.
- It's possible the taxation of costs in the IOP is wrong compared to the court rule.

10. Decision on Apps

- Because all the transcripts aren't filed with the application, do judges look for documents that are not in the record or are not supplied with the application?
    - Depends on the case and usually if a judge looks, will find what they need to decide the app
    - Other judges may not look and will decide the app on only the briefs.

11. Difference between application and appeal of right

- Applications – court doesn't have complete record or the transcripts.
- Appeals by leave may be considered of lesser import than appeals by right because of the lack of materials. At least for some judges. That is why it is important to order all transcripts first (expedite if needed). Sometimes in family law, applications are acted on more quickly than appeals of right.
- Built into the system is that claims are more quickly processed compared to apps. Although an appeal of right still takes significant time (relative – six months to a year can make a significant difference in the life of a child)
    - Tragedy in family/custody cases and criminal appeals/sentencing. How to fast-track apps: a compelling intro – why this is so important, plus a complete appendix,
    - Also, ask for "immediate consideration" of an app – listed as custody related or UCCJEA related, for example.

12. Questions

- Automatic Stays. In governmental Immunity cases, it's an appeal of right with automatic stay. But after filing appeal and getting stay, some trial judges require filing a motion for a stay, like they have the right to decide. One trial judge denied it.
- Motions heard by Motion Panel. The panel gets the motions Tuesday at 10am. (this may have changed) So filing an answer Monday at 5pm is unlikely to appear on the Tuesday docket. If it's a motion, the court must also wait for answer.
- If appellee doesn't file answer to app, after the answer period closes the case is submitted. Some attorneys ask the COA to call appellee to ask if they intend to file.

J. Breakout Room 10

1. Emergencies on appeal – emergency application process, motions to expedite, and the differences in the process; who has experience with these procedures?

- Emergency criminal appeal – jury had been empaneled and the trial court ruled against the defendant on an evidentiary issue; filed an emergency application at 6 am and was decided via peremptory reversal at 2 pm the same day.
- Calling commissioners and telling them about emergencies – judges have received emails about an incoming emergency from the commissioners and that's how it's teed up
  - Election law cases are a very good example of this – judges get told to be "on call" during a certain day because the commissioners know that there is a potential emergency coming in
  - "RMD" (regular motion docket) panel also get the emergencies since the 2024 change to the motion docket panel assignments
  - Judges just want to see "whatever you've got right now"
- Motion to expedite in a med mal case where the plaintiff might have died if not granted; was granted

2. Reconsideration docket has changed?

- Judges assigned to the docket serve for a 90 day period
- Not motions for reconsideration from an RMD panel decision
- Reconsideration docket is for the decisions made by the single judge administrative decisions
- Also a court reporter docket - "seems like you're in this forever;" handles show causes against court reporters, and this docket has had two in person hearings in the last three weeks

3. Transcript issues – shortage of court reporters, increase in court reporter rates, how to save money on transcripts, motions for less than the full transcript

- One way to save costs is to talk with the trial attorney and determine what the actual relevant transcripts/trial dates are; still have to stipulate or file a motion for less than the full transcripts
- Cautionary note: sometimes there are important issues that you may not know about that could be in transcripts that seem unimportant
- Judges: use what you need to determine the issues presented; however, there are some cases where the parties can get very contentious regarding what transcripts are actually necessary
    - Unless there is a stipulation, the full transcript is ALWAYS required
    - The record is always important in every case
    - Always be thinking about how the file can protect the interests of your client but also helps prevent you from putting yourself in a bad position in terms of legal malpractice
- In some types of cases, there is a problem where there could be ten years' worth of background proceedings that are not relevant to the issues currently being appealed but under the court rules, those have to be ordered and provided to the court
- Trying to work with trial attorneys to shorten transcripts; "brevity is the soul of wit"
    - Easy to go on and on but shorter is almost always better

4. Record on appeal and the MAPIS system

- MAPIS system is the same docket as you see on the Court of Appeals' website and populates it from something with the trial court
- Not consistent; every county is different
    - Breaks it down by month and panel number for "documents and records"
    - One panel only has access to their own documents for their cases, can't get into other panels' cases
    - Can see the briefs and the trial court records
    - Some trial courts make it very easy and others make it almost impossible
- Should we be overinclusive on appendices? Yes; some cases, the judges don't look at the appendix at all but in others, there are things missing from the appendix and that can create a lot more work for the judges
    - If it is important enough to put in the appendix, put the whole thing in

- Also make sure you are highlighting the sections that are most important while including the whole thing
    - Not routinely, but there might be a case where there is one witness or one piece of testimony that is very important and it should be highlighted
    - For practitioners, it is a time issue more often than not
- Pin cites in the brief are not enough because it creates more work/a multi-step process in finding the piece of information
- Judges who work off of hard copies often do not have the appendix printed out – if it's not a contested point about what happened, the judges are not likely to review the appendix
    - The appendices are usually loaded to the judges' reader programs for them to review if they need it
    - Judges often don't look at every document in an appendix; trying to move as efficiently as possible
    - The research department spends a much longer time going through the briefs and the appendices to compile the research reports
    - There are only a few cases that are "no-report" meaning that they come without a research report and just come to the judges with the record "cold"
        - "No-report" cases just come from the clerk's office just like the other cases; "no-report" cases are usually more complex and are assigned higher values than other cases; it's all random in terms of assignments
            - Judges do have "standing conflicts" which are the only way the assignment of cases are not random
        - Bench memos come from the judges' chambers pouring through the record; judges' law clerks performing the same function as the research group and then submit the memo to the entire panel
        - Judges' chambers are doing more recently due to the judicial vacancies because the research division is being overworked
        - Judges are more careful with the bench memo cases because they are relying on the other judge's chambers
        - "No-report" cases are usually the first ones to get dealt with and tried to get out two weeks before argument; "no-report" cases are also received a month prior to the other cases that come with reports

        - Cases are discussed immediately after case call in the caucus room; judges will usually discuss the proposed opinions and whether or not there are proposed changes
            - 80-90% of cases have proposed opinions circulated, but the cases are not decided until after oral argument
            - The judge who wrote the proposed opinion usually knows how they are going to decide the case, but the other two judges have not decided
            - There is not even a vote taken before oral argument
        - All of the judges take these cases very seriously because they know that every case is important to the litigants; never political, never philosophical
    - Being organized is the most important part; including an index to an appendix is so helpful
        - Bookmarks in the appendix are also very helpful
- Video or audio evidence is very difficult to deal with; just make sure you are getting it to the Court in the way the clerk's office is telling you
    - Clerk's office asked for a single USB drive for video evidence recently; they upload it to MAPIS and then can distribute it to the judges
    - If you get a call from the Court on a piece of evidence, it is because one of the judges is interested in seeing it
- Multi-volume appendices; how are we doing them? Are we doing them?
    - Appeals with multiple issues and several different types of motions, first thing to do is to compile the appendix before the brief is written to make sure that every volume is properly organized and labeled
        - Do have to change them as you go, but having something built beforehand is very helpful
- The snipping tool for something short is very useful; just take the snippet and put in right in the brief with a record cite
    - Judges find this very helpful
- Trial court exhibits – a nightmare in almost every case
    - Very little control over what is sent in or what the practitioners can even get a hold of
    - From judges' perspective: problem is inconsistent policies at the trial court level and what does the trial court do with exhibits after the trial is over
        - Exhibits are not just documents which also creates problems
- Make sure you are memorializing in-chambers and side bar conversations on the record; doesn't have to be super detailed but have to make sure the overall scope

of the conference is out there and that opposing has a chance to object to the recitation.

5. Jurisdictional issues – motions to dismiss or jurisdictional review

- Jurisdictional review is administrative and then any reconsideration from that goes to the reconsideration docket
- Jurisdiction can be reviewed at any time and if it's a problem, the judges will always review it
  - Almost always, these defects are resolved before the case gets to the judges
- One judge per district that deals with "non-substantive motions" like motions to extend, jurisdictional reviews, etc.

6. Oral arguments

- Could be helpful to hear from the Court beforehand what issues the judges are actually stuck on
- Updating the panel on published authority before argument is very helpful
- Most effect arguments are to argue what the lawyer thinks is the most important issue to supplement the briefing
  - Asking the judges what questions do they have is very effective way to begin the conversation
- Main purpose is to answer questions the judges have

K. Breakout Room 11

1. Final order issues

A) Consent judgments entered after MSD order used as final order when parties seek review of legal issue involved in prior MSD to review a legal issue can cause confusion about status as a final order

B) Mislabeling by trial court of final order when it is not

C) Family law cases - Judgment of Divorce is not necessarily the final order; need to wait for entry of uniform child support order, if applicable

2. Court suggestions re: final orders

A) File underlying orders to show dismissal of prior claims and parties if the final order doesn't pertain to the issues on appeal or reflect the dismissal of all parties

B) Do not need to serve parties dismissed by stipulation or dismissed for lack of service

C) Entry of final order controlled by date of entry on docket, if later than date on face of order

D) Jurisdictional issues raised on court's own motion go to a specific panel for review if court believes jurisdictional issues exist; may seek reconsideration if disagree with dismissal on jurisdictional grounds

3. Transcripts and Record on Review

A) Looking for entirety of record, even in family law cases; Court recognized that such cases can have a long history, but sometimes the court wants to examine threshold issues even if not raised by the parties, such as consideration of Native American heritage issues in adoption cases

B) Judges can access video or audio to judge demeanor in rare instances but not in favor of general review; Court noted that engaging in direct review of video has essentially converted cases involving dash cam to de novo review; videos can be submitted via USB drive

C) Issues on appeal - Discussion regarding bringing in parallel proceedings, such as PPO and related custody issues

D) Differently formatted Register of Actions cause problems identifying hearing date and in family law cases, they don't always include FOC hearing dates; the clerk's office is aware of the problem and deal with the issue as well

E) Court is aware of difficulties with certain county court reporters, including inability to get in contact at all and that as a result, getting expedited transcripts can be difficult; Court recommends motion to extend before motion to show cause; Court recognized unfairness to parties having to pay for attorney time and motion fee for court reporter issues

F) Appendix - Court wants them bookmarked and links within the document from the Table of Contents to the specific document within the Appendix

III. Law Practice Breakout Sessions

A. Criminal

1. Appellate Lawyers Navigating Trial Territory

a) Procedural and Timing Challenges

Issues:

- Prosecutors face tight deadlines once motions for new trials are filed, often with little preparation time.
- The 56-day rule is insufficient for defense counsel to complete investigations and offers of proof.
- Courts are inconsistent about granting deadline extensions.
- Cases are not assigned in prosecutor's offices until pleadings are filed, creating delays and mismatched expectations.
- Evidentiary hearings are resource intensive – appellate prosecutors less confident in their litigation abilities, and amount of investigation needed for both sides is high.
- The COA sometimes grants motions to remand without granting the application – so without jurisdiction.

Solutions:

- Extend the 56-day timeframe for defense to prepare.
- Encourage trial courts to accept stipulated deadline extensions from both sides.
- Promote early filings in the trial court to reduce reliance on COA motions.
- Encourage mutual agreement that both sides deserve adequate time to prepare.
- Consider advocating for a Court Rule change to address time/resource inequities.
- Prosecutors and defense attorneys should work more closely together and find common ground. Both sides need more time and resources and should combine forces to advocate for such.

b) Ginther and Post-Conviction Hearings

Issues:

- Growing number of Ginther hearings, particularly in smaller counties.
- Trial attorneys may feel pressured to sign affidavits of ineffectiveness.
- Inconsistent court understanding of when Ginther hearings are appropriate.
- Lack of clarity about rules of evidence in these hearings.
- Defense attorneys may become witnesses if their affidavit contradicts testimony.

Solutions:

- Encourage resolving issues early at the trial court level.
- Clarify when MRE 1101 applies in post-conviction hearings.
- Make a clear record of all agreements, expert consultations, and plea deals.
- Promote practical training for attorneys and judges on hearing requirements.
- Use trial-experienced prosecutors or appellate attorneys to assess need for hearings.

c) Education Gaps in the Trial Courts

Issues:

- Some trial judges lack familiarity with MCR 6.500 and procedures for granting post-conviction counsel.
- Inconsistent approaches to remands and hearing protocols.
- Some judges are unsure when they can appoint attorneys or experts at public expense.

Solutions:

- Conduct training for judges on post-conviction procedures.
- Use appellate attorneys to educate trial practitioners on how to avoid creating appellate issues.
- Promote SADO or MIDC-led seminars to raise awareness of available defense resources.

d) Expert Use and Resource Disparities

Issues:

- Defense often lacks access to comparable experts used by the prosecution.
- No centralized process for funding or locating experts.

- Poor documentation by trial counsel about expert consultation, hurting IAC claims.
- Variability in whether defense or prosecution gets adequate time for expert reports.

Solutions:

- Create a centralized resource listing expert funding options (e.g., via MIDC).
- Normalize consultation with experts as part of IAC analysis.
- Ensure equal timelines for both sides to submit expert reports.
- Encourage use of experts, especially when the prosecution relied on them at trial.

e) Juvenile Lifer Resentencings

Issues:

- Delays due to victim consultation requirements and difficulty locating victims.
- Defense focused on client relief; prosecutors face pressure from victims and tight timelines.
- Courts vary in experience and comfort level with these complex cases.

Solutions:

- Recognize the emotional and logistical challenges for both sides.
- Improve communication and collaboration between prosecution and defense.
- Develop a consistent, equitable approach to resource distribution and scheduling.
- Assign prosecutors with relevant trial experience to improve case handling.

f) Action Steps by Role

For Defense Attorneys:

- File motions early and prepare strong offers of proof.
- Use experts strategically and make clear records of their involvement.
- Seek stipulated extensions to give prosecutors time to prepare.

For Prosecutors:

- Agree to remands when appropriate.
- Streamline victim consultation processes.
- Assign trial-savvy APAs to post-conviction matters.

For System Stakeholders:

- Advocate for a 56-day deadline extension.
- Push for clarity on evidentiary rules and jurisdictional authority.
- Provide ongoing training for judges and centralized expert funding support.

2. Understanding Wrongful Convictions from the Appellate Bench and Bar

a) The definition of a wrongful conviction

The concept of false confessions is not an obvious phenomenon, particularly to lay people. Some participants at the sessions though that there may be among some lay people a refusal to believe that there could be bad faith on the part of the police, prosecutors, and law enforcement more generally.

Regarding the meaning of "wrongful conviction," there appeared to be a different understanding among the session participants. One advocate pressed that not every "wrongful conviction means" the person is actually innocent of the crime just because there is something fundamentally unfair about a trial. And others noted that proving actual innocence was a difficult thing. Thus, this understanding thought that legal relief sought is not "this person is innocent" but that there is a legal problem with the proceedings leading to conviction.

Some participants noted that studies suggest the prevalence of individuals who are convicted but are actually innocent may be 3% to 5% of convictions, consistent with the National Registry of Exonerees.

One member of the judiciary commented it was helpful in meeting with someone who was wrongfully convicted. It had a profound effect on this judge's thinking and attitude.

b) The role of prosecutor, Conviction integrity units, and *Cress,* and MRPC 3.8

The other significant theme of the session discussed the ability of innocent defendants from obtaining relief under current Michigan law, most notably *People v Cress,* 468 Mich 678 (2003) and MCL 770.1. The discussion also included a description of the role of CIU units in the Department of Attorney General as well as four counties (Macomb, Oakland, Washtenaw, and Wayne).

There was disagreement about the adequacy of the legal standards to enable a criminal defendant to obtain relief under *Cress* and MCL 770.1. For those who thought the standards to be inadequate, they identified some of the barriers to relief, including the requirement that the evidence be new or otherwise not available based on due diligence. In response, those who supported the current standards noted that importance of ensuring that the law did not recreate opportunities for second-guessing jury verdicts based on evidence that was essentially already considered and rejected or not presented because it was not probative.

The discussion also included reference to the Michigan Rules of Professional Conduct, MRPC 3.8, which imposes an affirmative duty on prosecutors to investigate where new evidence presents a reasonable likelihood of innocence of a previously obtained conviction. Some attorneys noted the difficulty of applying this standard. And related to MRPC 3.8, one participant noted that the ABA 3.8 was basis for CIU's, but very few states have codified CIUs.

One participant asked whether we need CIUs in light of MRPC 3.8. That is, prosecutors have ethical duty to investigate even without a CIU. This participant noted that Michigan's jurisprudence under *People v Anderson* also indicates courts have an obligation to listen to claims of innocence.

One participant noted that CIUs can work slowly. Another suggested that prosecutors and judges entertaining a MCR 6.500 motion may want to push such claims to CIU units.

There was a recognition that the investigatory abilities of prosecutor appellate units are slim in terms of time and resources, particularly in cases that are decades old and require a lot of investigation. The shape and staffing of CIUs can vary from county to county. For example, one county has an entirely separate unit without any involvement from the prosecutor's office. In that county, the prosecutor's office general staff does not have input.

Ordinarily, prosecutors are in a position of defending convictions as a matter of course, so one participant contended that the prosecutors are not well-equipped to be able to uncover facts that would counsel changing course rather than defending that conviction. Appellate prosecutors spend their time defending legal claims; it is not the same skill set to investigate crimes or assist in developing records, both from the standpoint of resources and from basic perspective.

From the defense standpoint, certain prosecutors will occasionally or even often take seriously legitimate claims of innocence, but that occurs at the discretion of the elected prosecutor of each county.

The Attorney General's CIU reviews cases for counties that do not have one. One advocate is under the impression that the Attorney General will not take action where the county prosecutor is not in agreement. Some felt codifying in rural areas would be helpful. Small counties where there is one judge and one prosecutor.

The question was raised whether the CIU unit needs to be more independent from the office itself. Some said there was a firewall between the prosecutors and the CIU. For some counties, independence might be needed, but other counties may not.

One participant contended that we need to admit that our highest goal is not wrongful convictions, but finality. This claim was levelled because this participant believed that the rules for relief were so stringent. On the other hand, others noted that there has to be some finality otherwise people would just continue to file the same things over and over. The stringent rules in some cases force Innocence Projects and CIUs to reject a lot of cases.

Regarding MCR 6.500, one participant asserted that the rules need to be amended, contending that it is not far that a litigant can only file one 6.500 motion. The participant also complained that it is also hard when an issue cannot be re-litigated.

We need to look at the plea process and why innocent people will plead to a crime they did not commit. Many times clients cannot afford a lawyer and cannot afford the bail/bond and the outcome is different for them then those that can afford to hire a lawyer and can afford to post the bail/bond.

There was a recognition that it is difficult to sort legitimate claims from illegitimate ones. One participant noted that prosecutors generally rely on the jury system, respecting what the jury had decided.

A defense counsel believed that perhaps some of the pushback from prosecutors comes from serving victims and the need for finality, even in true cases of actual innocence. This person noted that the prosecution does not represent the victim, but it represents the People of the State of Michigan.

One advocate raised a problem with the jury system in that the broad majority of actually innocent defendants are Black or other people of color.

c) Role of the judiciary

Some members of the bench contended that judges and courts should always go extra mile to make sure the question of innocence is answered. It is a judge's worse nightmare that an innocent person is convicted.

One member of the bench noted that the court only knows what is in a court file, the judiciary does not have what the defense or prosecution possesses in their files.

A member of the bar argued that if the CIU unit and defense attorney stipulate, a judge should not block this resolution. Another member of the bar said this could be because parties agree to imprudent or legally unjustified actions based on other considerations.

One of the sessions also discussed that if wrongful conviction units, CIUs, Innocence Projects have details into investigation, their resolution – absent a compelling reason – should be accepted by the court.

It was also discussed that appellate rules have changed and going to the trial court has made things better somewhat because more evidentiary hearings have been granted. There have been some successes in COA.

One judge sees most of the remand orders from the Court of Appeals will occur where there is a misapplication of the legal standards rather than for seeking an evidentiary hearing, which is far less common in the 6.500 context). Another judge noted that the filing of repeated MCR 6.500 motions makes it more difficult to separate valid from meritless claims.

d) Wrongful Imprisonment Compensation Act (WICA)

With regard to the discussion of the WICA, there was a discussion about the standard used to be entitled relief under the Act. See MCL 691.1751. Under Michigan law, the standard requires proof of actual innocence, and it does not include those whose convictions that were obtained in violation of constitutional standards.

Some attorneys thought that this higher threshold of proof would prevent some innocent convicted defendants from obtaining relief because they were unable to prove their innocence. But other attorneys countered that the statute did not purport to cover all innocent defendants, and this lesser threshold would enable those who may have been guilty of the crime, but were later acquitted, to obtain relief despite their criminality. Under this view, an acquittal is not an exoneration.

In the end, all the participants recognized that this is a policy question, and one for the Legislature on which there are legitimate arguments for each position.

Related to this policy question, some of the attorneys who supported expanding the WICA law noted the difficulty of obtaining relief for those whose convictions were plea-based.

e) Resource Questions

One participant noted a fundamental problem with backloading the resources rather than doing it at the front end, i.e., before a trial or even before charges are issued. Investigators, experts, etc. By the time of trial, should not there be more investment in investigation, rather than 10 or 20 years down the road.

Another participant expressed concern for the lack of consequences for police officers, for example, that yield a false confession. Other states have commissions that evaluate why the wrongful conviction occurred and to take corrective action in the future.

Another participant asked whether embedding appellate attorneys with trial attorneys help "frontload" some of the forethought and problem solving. Rarely do appellate prosecutors get involved at the trial level, which is true also for appellate public defense counsel.

Another participant asked what grabs attention of the Court of Appeals in an application for leave to appeal regarding a wrongful conviction. There was a discussion about the fact that there is often a lot of work that goes into evaluating the application, although the denial of an application for leave is typically disposed with the short statement of lack of merit in the grounds presented.

One attorney raised the possibility of CLE training both for PAAM and indigent defense. Many times, the advance of technology has made uncovering wrongful convictions more accessible and that perhaps there should be training to bring attorneys up to speed on these.

One participant asked whether CIUs should be required by law so that different administrations in different counties cannot change the goals or funding? A statewide CIU? A state review commission?

Another participant asked what the standards for relief should, only actual innocence or extended to unfair trials.

3. Preservation! Waiver! Forfeiture! Oh my!

a) Problems

(1) Standards of Review – Disagreement and Strategic Framing

Disagreement persists between prosecution and defense on which standard of review applies (e.g., plain error vs. abuse of discretion vs. de novo), especially in motions under MCR 7.208. Defense attorneys fear that prosecutors reframe issues to force a more deferential standard (abuse of discretion) even when constitutional issues should be reviewed de novo. Inconsistencies across courts

about how and when standards apply. Some prosecutors rely heavily on *Carines* to frame issues under the more favorable "plain error" standard. Concern over appellate courts deciding issues not raised by the parties, especially in the MSC, without proper briefing.

(2) Waiver vs. Forfeiture – Unclear Boundaries

Example: When a trial attorney says they are "satisfied" with jury instructions, that can be considered waiver, even when it's clearly an error—forcing appellate defense to raise the issue as IAC (Ineffective Assistance of Counsel). Questions persist about whether silence or inaction by the defendant or defense counsel constitutes waiver. For lesser included offenses, uncertainty over whether failures to request them are waivers or forfeitures.

(3) Comparing Prejudice Standards – Plain Error vs. IAC

There is debate over how different the prejudice prong is under plain error (*Carines*) and under *Strickland* (IAC). While plain error requires showing it affected the outcome, IAC requires showing a reasonable probability of a different outcome. The two often overlap in practice, but may be harder to meet under plain error.

(4) Procedural Challenges with MCR 7.208

There's increased reliance on motions for new trial under MCR 7.208 to preserve issues. There was some confusion about whether raising an issue in a 7.208 motion preserves it for appeal without a contemporaneous objection at trial. Differing standards apply depending on how the issue is framed: error by the trial court vs. IAC.

(5) Jurisdictional & Structural Errors

Carines arguably misapplied to jurisdictional errors like double jeopardy or courtroom closure. Structural errors (e.g., forced self-representation or denial of counsel) often misunderstood or underdeveloped in court rulings.

(6) Appellate Record & Exhibits

Inconsistent or vague trial records hinder appellate review. COA emphasizes need for complete records, including unadmitted exhibits. Some prosecutors struggle to obtain or preserve trial exhibits due to poor tracking by trial teams.

(7) Retroactivity Confusion

There were conflicting views on whether an error should be considered plain if the law changed after the trial (e.g., juvenile life without parole sentencing

post-*Miller*/*Carpenter*). Defense argues that ongoing constitutional violations are still live issues, regardless of what the law was at trial.

b) Possible Solutions

(1) Better Framing of Standards of Review

Frame standard of review carefully to align with most favorable analysis (constitutional = de novo, trial court ruling = abuse of discretion).

(2) Clearer Jury Instruction Language

Trial attorneys should avoid unqualified statements like "I'm satisfied." Instead, use clarifying language such as: "I'm satisfied, but not waiving any objections I may have missed."

(3) Strategic Use of IAC

When preservation is unclear, argue IAC as the primary or alternative basis for relief.

(4) Motion Practice and Trial Collaboration

Improve pretrial motions and encourage trial counsel to preserve issues clearly. Consider educating trial lawyers about appellate consequences to help build better records. Suggest that MAACS or SADO send appellate briefs to trial lawyers to illustrate what's at stake.

(5) Improved Record Management

Trial teams should retain and label exhibits clearly for appellate use. Encourage evidentiary hearings to build a clear, reviewable record, especially in suppression and sentencing matters.

(6) Clarify Court Roles and Communication

Urge appellate courts to explain plainly when and why they are applying *Carines* or addressing unbriefed issues. Promote better transparency when courts raise issues sua sponte.

(7) Rule Reforms and Advocacy

Consider pressing for statutory or rule changes to harmonize *Lukity* and *Strickland* standards. Push MSC to clarify when constitutional harmless error applies instead of statutory "more probable than not" standard under *Lukity*.

4. Posey's Implication on Appellate Sentencing Review

a) Issues

(1) Inconsistent Trial Court Responses

Many trial judges continue to ignore or minimize *Posey*, treating within-guidelines sentences as presumptively valid without sufficient articulation. Judges struggle with what qualifies as the "magic words" needed to justify a sentence under *Posey*. Some are unsure how much detail is required. The lack of a clear framework (unlike *Snow* factors) leads to unpredictable and inconsistent application. Sentencing toward the top of the guidelines often triggers concern but is rarely accompanied by an explanation that satisfies *Posey* scrutiny.

(2) Sentencing Records Still Deficient

Courts frequently fail to explain sentences in a way that allows for meaningful appellate review, even post-*Posey*. Appellate remands often result only in minimal articulation rather than substantive change. A significant share of remands are for articulation, not resentencing, contributing to defendant uncertainty and limited relief.

(3) Mitigation and Sentencing Preparation Challenges

Judges report not receiving mitigation materials or sentencing memos unless requested. Public defenders and trial attorneys often lack time, resources, or access to mitigation specialists, particularly in smaller counties. Mitigation evidence is undervalued or misunderstood by some judges, and often not connected clearly to sentencing arguments by attorneys.

(4) Ambiguity in Appellate Standards

"Unusual circumstances" standard to rebut proportionality is vague and inconsistently applied. Abuse of discretion standard feels like de facto de novo in practice, but lacks clear appellate guidance. Appellate briefs often fail to tie case-specific facts to the applicable legal standard. There's no shared understanding of what constitutes plain error, structural error, or a reversible sentencing rationale.

(5) Systemic Barriers

Wide sentencing ranges complicate proportionality review and make disparity hard to assess. Heavy trial court dockets limit time available for thorough sentencing explanation. Inadequate access to PSIRs (pre-sentence investigation reports), particularly in Wayne County, hampers timely and effective sentencing advocacy. Judges and practitioners agree: the lack of appellate consensus leaves courts without clear direction.

b) Possible Solutions

(1) Strengthen Sentencing Practices

Encourage trial judges to explain reasoning—even within guidelines—especially when sentencing at the top of the range. Encourage use of sentencing memos and mitigation reports from both sides, ideally provided in advance. Promote a culture of explanation over "magic word" compliance—judges should speak to the individual and the facts of the case.

(2) Improve Mitigation Integration

Use mitigation specialists to humanize defendants and clarify why a lower sentence is warranted. Train judges and lawyers in trauma-informed practices and rehabilitative frameworks. Educate attorneys on how to close the loop—i.e., connect mitigation facts to legal arguments clearly.

(3) Enhance Appellate Strategy

Tie appellate claims to the trial court's failure to connect facts to the sentence. Seek retention of jurisdiction on remands to ensure meaningful and timely resolution. Push for more published opinions to resolve conflicting appellate guidance and build clear precedent. Encourage prosecutors to acknowledge error early, particularly when the sentencing record is deficient.

(4) Reduce Barriers and Build Capacity

Lower public defender caseload caps and increase access to mitigation experts across counties. Ensure timely access to PSIRs and compliance with court rules requiring disclosure before sentencing. Consider state-level data collection on sentencing to identify trends and support reforms.

(5) Clarify Posey's Scope and Remedies

Request MSC guidance on what constitutes "unusual circumstances" and when resentencing vs. articulation is appropriate. Advocate for more structured sentencing factors, akin to *Snow*, while recognizing Michigan's practical constraints. Clarify whether *Posey* applies to mandatory minimums and how it interfaces with other standards like *Milbourn*.

B. Civil

1. The Ins and Outs of Stays on Appeal

a) Factors impacting decision to seek a stay

- Impending trial date with threshold issue on interlocutory review.
- Difficulty in reversing impact of order on appeal if successful.
- Financial concerns about inability to recover judgment funds if paid then reversed on appeal.

b) Procedural issues

- Motions for stay should be filed first in the trial court. The Court of Appeals has discretion to waive that requirement, but that would be unusual.
- In emergency situations, an Immediate Consideration Motion must be filed, along with a deadline for the court to decide it. The Court will decide an Application for Leave, Motion for Stay and Motion for Immediate Consideration all at the same time.
- A grant of leave does not guarantee that a stay will also be granted. The Court may also grant a partial stay, such as if discovery remains ongoing.
- A Motion will sometimes cite the significant amount of money that will have to be spent if the case proceeds without intervention. There was no consensus on if this information is valuable to the Court.
- The Court of Appeals will sometimes issue a stay *sua sponte*.

c) Standards applied to stay motions

- Practitioners noted the need for standards for stays, suggesting that an opinion would be helpful since currently, orders granting stays must be pulled from the COA's website.
- Although the test has yet to be formally adopted, stay motions commonly utilize the four-factor test for injunctive relief, with particular focus on irreparable harm.
- Family law cases have different interests to address and involve unique claims of irreparable harm.

d) Appeal bonds and other forms of security

- It is critical to contact the surety or relevant party after the verdict and before the judgment to procure an appeal bond. If you are able to start discussions earlier, that is also encouraged. Sometimes it is necessary seek an extension of the automatic 21-day post-judgment stay.

- Counsel should try to get entry of final judgment postponed until any post-trial awards of attorney fees and costs are entered so there is only a single order to seek stay/bonding.

- Bond premiums generally range, with 1% serving as a good starting place. Practitioners noted that an opinion would be helpful on motions for reduced bonds, as case law is lacking. Arguments for a lesser bond might include the risk of employees losing jobs, particularly when representing a small business.

- Bond fees can also depend on the nature of the collateral, with illiquid collateral such as real property warranting higher bond fees; these costs can be taxed if successful on appeal.

- Creative solutions, such as using a credit exam to determine the defendant's assets and issuing an order that certain things will not be extinguished, were suggested to satisfy bond requirements.

- Parties might enter into an agreement for a different type of collateral, such as a letter of credit. However, alternative arrangements are complicated, and practitioners were advised that it is typically better just to get the bond.

- A party wishing to submit a liability policy in lieu of a bond must file a motion. If the judgment exceeds policy, there may be a gap amount which still needs a bond.

- Cash bonds may be used, but many clerk's offices are not familiar with the process, so it is important to contact them ahead of time. Many counties require a court order.

e) Automatic stays

- In civil cases, there is an automatic 21-day post-judgment stay.

- Posting bond for 110% of the judgment amount, including interest, entitles the judgment debtor to a stay on appeal.

- Probate court has an additional 21-day automatic stay on filing of timely claim of appeal by statute; recommended consideration of extending this

to all matters where claim is timely filed, to permit bond process to work through.

- Exception to governmental immunity automatic stay can be abused so opposing counsel may need to educate the court that the issue on appeal is not one involving immunity, just because government is involved; a revision to the court rule is in a working group for review.

f) Violations and enforcement of a stay order

- First remedy is trial court.

- Court of Appeals will look at a motion to enforce its stay if the trial court is not upholding it.

- May need to educate opposing counsel regarding the automatic stay between issues of the COA opinion and the time to seek review from the MSC.

g) State vs federal practice

- Federal rules state that practitioners must look to the state rules. It was noted that there is no automatic stay for a governmental entity in the Western District (federal).

h) Post-litigation release of bond and related issues

- Litigation may arise regarding the bond release or cancellation, especially concerning disagreement on the final amount between the parties and issues with the surety.

- Practitioners should talk to the surety early in the process and when they are ready to close the bond out.

- Sureties should be notified of settlements.

- The surety sometimes requires specific language in the order discharging the appeal bond. Discharge language should be provided to the surety ahead of time for review and approval.

2. Adding Value: The Benefits of Embedded Appellate Counsel at Trial and Tips for Success

a) Role of Embedded Appellate Counsel

- Focusing on matters related to preservation, objections, and waiver of issues at the trial level so that the record reflects everything it should, or that benefits the client, on appeal.

- A great deal of work spent on motions in limine, *Daubert* motions, and objections.

- Ideally they are involved earlier on throughout the course of litigation, not simply upon the eve of trial.

- Some of the best parts of being embedded counsel – all of the experiences of trial without as much of the pressure. It can also be incredibly beneficial to the appellate attorney themself in that they were at the trial and know first-hand precisely what happened. It can also help a great deal in seeing the difficulties that trial counsel experiences sometimes in working with a judge who is hostile to making a complete record or make objections.

- There can be difficulty in working with certain trial attorneys, however, in that some trial attorneys are less receptive than others when it comes to having an embedded appellate attorney looking over their shoulder while doing trial work.

    - These tensions can cause issues in the trial team, which eats up time and energy during a time period where every second and ounce of energy matters.

- Additionally, there is a possibility of burnout related to a given case – to take a case all the way through trial and then all the way through an appeal is exhausting.

- Defining the relationship is critical, and can vary from circumstance to circumstance:

    - Some present indicate that they believe that the trial counsel has trial expertise, and should have the discretion about what to object to or not, within reason, but the jury verdict form must be precisely what the embedded appellate counsel directs. A lack of those boundaries can result in friction.

    - Others have experienced trial counsel who defer to appellate counsel, asking questions about preserving the record – what to

object to, what to push, etc. – that would typically be a discretionary call for the trial counsel.

b) Placement / visibility

- How visible have embedded trial counsel been at trial?

    - Sometimes it can be helpful or safer to not sit at counsel table or be identified as an additional lawyer. This can allow appellate counsel more freedom to watch the jury, listen to some specific questions, and build an understanding of certain issues that trial counsel is not as concerned about.

    - Alternatively, this precludes them from acting as an attorney for the purposes of voir dire, argument, etc. Logistically, that leaves counsel to either text/email to communicate, though this may not be available, depending on the court, or else to merely communicate with them in breaks in the proceedings.

    - Another factor to consider – often as a negative thing, but not always – the visual look of having too many attorneys and how that comes across to the jury.

c) Can embedded appellate counsel draw the ire of the judge? Do you feel that in the moment?

- Absolutely. Various motions being argued, especially for mistrial, can restate a great deal of information that judges have already heard. Additionally, many judges actively don't want their docket messed up with mistrials. Once a trial begins, they want to push the case forward to its conclusion.

d) Working with trial counsel

- A great deal of discussion was had related to tensions between trial counsel and appellate counsel. What has been found to help encourage a positive relationship with trial counsel?

    - Splitting the work and carrying weight, instead of just doing the preservation work, can be helpful. For instance, having appellate counsel draft portions of a motion for summary judgment/disposition that are purely related to law, while trial counsel focuses on the more fact-driven portions of such motions.

    - Understand that if an appellate attorney gets involved at trial, they must understand how trials work, and also specifically know the facts of the case.

- Drawing clear lines and boundaries about what the appellate attorney is there to do, and what the trial counsel is there to do.

- It can also help to not pit yourself against the trial counsel – trying to correct preservation issues or avoid preservation issues altogether is one thing, but running to the client to point the finger at the trial counsel can often be unhelpful and create that unwanted tension.

e) Workload During Trial

- It's important to note that being embedded counsel at trial often results in a lot more work and a lot of late nights. Between the normal workload you normally have, along with the daily reports and taking notes in preparation of working on motions for mistrial or post-trial motions, being embedded at trial can create a great deal of work. To say nothing of the change in the atmosphere – many appellate attorneys have a regular schedule of going to the office and drafting briefs, largely only broken up by preparing for, and attending, oral arguments. Trial is certainly a very different atmosphere than those typical experiences.

f) Other practices while embedded in trial

- Some appellate attorneys will protect their trial counsel by preventing, for instance, insurance counsel from talking to trial counsel overmuch, which can throw the trial attorney off their game and result in "too many cooks in the kitchen."

g) Cost

- Embedded trial counsel can also be difficult to make happen from a financial standpoint – paying for an entirely separate attorney's time can become very expensive, especially with the rates of many mid-to-large sized firms' hourly rates.

h) Greatest difficulties

- Trying to keep everyone happy all at once, while also being the one raining on parades with trying to keep the record properly preserved.

- There's also a great deal of risk involved – if you get your way at trial in terms of how to proceed, and it turns out that you were wrong, when you're handling the appeal, you have no one on whom to place the blame but yourself.

- Balancing the desire to win the case at trial – as defending a win at the trial court level is easier than fighting a loss – with the objective/empirical knowledge that you need to have a preserved, clean record.

i) Timing

- Best time to bring appellate counsel into trial level matters

    - No matter what, before the final pre-trial conference. Past that point, no court wants to hear about new theories of the case or about questions of law or fact that should have been raised earlier. It's also sometimes hard to pick up on the story that your trial attorney is trying to tell in the first day of trial, but it's critical to know that story to do your job properly.

    - This can also help train the judge understand or predict the appellate counsel's presence – often if there is a fact issue, the trial counsel will handle the motion or issue, while if there is an issue of law, the appellate counsel will step up and handle the matter.

j) Selling the notion of embedded appellate counsel to clients

- Refer to "Appellate and Trial Counsel Partnering to Win" article for adding value to the trial process itself.

- Find a specific issue to sell, often by the type of case. There are many issues that appellate issues know well or work with regularly that trial counsel does not. (Line-by-line verdict forms, economist/expert opinions, etc.)

k) Improvement of appellate counsel as being embedded in trial process

- General consensus that being involved at the trial level makes appellate attorneys better at being appellate counsel.

- Many appellate attorneys present take depositions, argue trial level motions, etc. Don't be an "ivory tower" attorney. Get involved, it will make you better.

l) Advice for newer appellate practitioners

- Put yourself in as many positions as possible, gather as many tools and skills as humanly possible.

- Try to get trial experience.

3. The Latest in Effective Brief Writing

a) Change from page limits to word limits—has anything changed?

- Some participants didn't even notice this change.
- From the judges' perspective, it's had no impact.
- Others feel that it gave them more freedom for page layouts/visibility.
- Positive net result—good change.

b) Brief Catch

- Very few have used it.
- Helps with making briefs simpler, easier to read.
- Does it give you better work product or does it make you a better writer? Some said better writer.

c) Use of AI

- Cautious of made-up cases.
- Good for identifying questions for oral argument—feed in briefs and ask it to identify hard questions.
- No one had used AI to actually write a brief, doesn't feel ready yet.
- More advanced tech already exists but isn't yet publicly available.
- Good analogy: very smart, extremely untrustworthy junior associate.
- Can be good for improving writing but not working in gray areas/analysis.
- When are the pro per litigants going to start using AI to generate briefs?
- If a brief uses AI-generated hallucinated cases, you could bring a motion to strike but you better be sure.
- Confidentiality/ethics concerns about uploading client information into AI platform. Not sure security protocols will ever develop to the point where it's safe.
- Should the Michigan Court Rules be amended to require disclosure of AI use in a case? Federal rules have this requirement. Or a statement that AI *wasn't* used? Should there be sanctions for using AI that results in hallucinated cases? Generally concerned about the idea of blanket banning AI.
- Supreme Court is aware of these issues—they don't want to get ahead of problems, so hanging back and continuing to monitor. Piloted Clear Brief a few years ago. A few co-counsel licenses for Learned Hand.

d) Sharpness/readability: does it really make a difference for audience (judges, clerks)?

- Maybe, maybe not.

- Judge perspective: bad briefs can lose cases, but great briefs doesn't guarantee a win.

e) Judges reading in electronic formats/on iPads: anything that helps readability?

- Judge reads briefs, memos, and reports on iPad but edit in hard copy.
- Maps are especially helpful.
- If referencing bodycam footage, include stills.
- Pictures are a nice break from 20+ pages of text.

f) How can we be helpful to the Court/research staff?

- Providing a table of transcripts.
- Don't use acronyms unless obvious ("GM") ("IBM") but if you're going to use them, include an index for reference.
- Make sure to include important exhibits in the appendix, since it often isn't transmitted by the trial court.
- Keep in mind, you have two audiences: (1) research; and (2) judges.

4. Writing Effective Applications for Leave to Appeal in the Court of Appeals

This session focused on three main types of applications for leave to appeal: (1) when appeal as of right is to circuit court; (2) interlocutory applications; and (3) delayed applications due to late filings. Participants—including appellate practitioners, court clerks, and judges—engaged in a wide-ranging discussion of both procedural and strategic considerations involved in pursuing and reviewing these applications.

a) Purpose and Strategic Considerations

- Interlocutory Leave: Commonly granted when issues are dispositive, involve undisputed facts, or require immediate clarification to avoid unfairness (e.g., cases involving privilege, no-fault insurance disputes, or denials of motions to change venue).

- Merit and Timing: Courts are more inclined to grant leave when immediate resolution would prevent significant legal harm or wasted trial resources. Applications are more persuasive when the stakes are clearly outlined early—ideally on the first page.

- Circuit Court vs. Administrative Appeals: Applications arising from administrative appeals to the circuit court tend to be viewed less favorably. Judges emphasized that they still carefully review the record but expect strong reasoning to justify further review.

b) Content and Structure of Leave Applications

- Brevity and Clarity: Judges prefer applications under 10 pages that clearly identify the core issue without extensive procedural background. Excessive facts or legal argumentation—especially where not outcome-determinative—can obscure the central issue.

- Statement of Harm: A concise articulation of the harm if review is not granted is critical. Judges noted that generic assertions of increased legal fees are insufficient. Effective applications frame harm in terms of legal rights, justice system efficiency, or risk of irreversible prejudice.

- One Issue Rule: Applications focusing on one core issue are more likely to be successful. Including multiple issues often signals to judges that the case is not suited for interlocutory resolution.

c) Delayed Applications and Procedural Considerations

- Delayed Filing: Judges emphasized that meritorious applications are not rejected solely because they are filed late. Reasons for delay (e.g., waiting on transcripts, computer failures, attorney inexperience) are typically accepted if the application otherwise warrants review.

- Supplementing the Record: When essential facts or developments arise post-judgment (e.g., through reconsideration motions), applicants may include such materials if they are crucial to resolving the issue.

d) Court Preferences and Judicial Workload

- Judicial Bandwidth: With judges often receiving dozens of applications weekly, clarity, organization, and efficiency are vital. Overlong submissions, overly complex factual scenarios, or multiple unrelated issues reduce the likelihood of favorable review.

- Supporting Materials: Attaching targeted exhibits can be helpful, but voluminous or duplicative materials are discouraged.

- Judge's Reputation and Trial Conduct: While some judges avoid factoring in the reputation of trial judges, others may consider recurring patterns or problematic rulings if clearly documented.

e) Consensus and Competing Views

- Consensus: Short, targeted, and well-written applications that identify a pressing legal issue with systemic implications or potential for clear error correction are more likely to succeed.

- Divergence: Some panelists debated the weight to give a trial court's rationale in administrative appeal contexts. There were also differing views on whether highlighting trial judge conduct is persuasive or distracting.

f) Action Items and Recommendations

- Educate newer practitioners about the structural and strategic differences between merit briefs and leave applications.

- Consider refining the court rules to limit cross-appeals in interlocutory settings to more closely align with the issues in the initial application.
- Develop clearer internal standards for handling delayed applications and supplementing the record to ensure consistency across judicial panels.

5. Avoiding Defective Initial Filings and Costly Jurisdictional Mistakes

a) Determining finality of judgments/orders

- Finality + Time = Jurisdiction: An appeal must stem from a final order and be filed within the time permitted by court rules.

- Finality Confusion: Declaratory judgments, pending damages, and inconsistent language in bench rulings can create ambiguity.

- Governmental Immunity Orders: Interlocutory appealable by right, but parties sometimes file both appeals by right and applications for leave.

- Stipulations to Manufacture Finality: Dismissals without prejudice cannot be used to fabricate finality under prevailing case law.

- A post-judgment order awarding attorney's fees under a court rule or statute is its own appealable final order. So there will be two appeals in that situation: one from the underlying judgment or order, and one from the order awarding attorney's fees. This is not necessarily the case if attorney's fees are contractual.

- If necessary, file multiple claims of appeal and let the Court of Appeals make the call on what is the final judgment.

- The required language "this is the final order and closes the case" does not determine finality. It is a trap for the unwary.

b) Identifying the order(s) being appealed

- Reconsideration Denials: Appeals should be filed from the underlying order, not the denial of reconsideration.

- Multiple Orders: When several orders are attached to a claim of appeal, clerks seek clarity on which one is deemed the final order.

- Finality Rule: Under MCR 7.202, a case may have more than one final order. Appeals must be timely filed from each qualifying order.

- FOIA Matters: Final orders in FOIA cases require specific SCAO form checkboxes; statutory expedited treatment applies.

c) Appeal deadlines and extensions

- Time Limits Are Jurisdictional: Missing the deadline for an appeal of right forfeits the appeal.

- Post-judgment motions toll the time to appeal. If a party needs more time to file their post-judgment motion, the trial court can grant an extension (once), and the order has to be entered ***before*** the 21-day claim of appeal filing deadline.

- Delayed Leave Applications: More forgiving, and judges often still evaluate on the merits.

- Holidays and Weekends: Deadlines falling on these dates move to the next business day.

- Use of Forms: The SCAO claim of appeal form is accepted even for complex, multi-party cases when customized properly.

d) Transcripts and briefing deadlines

- Transcripts: Must be timely ordered to avoid jeopardizing appeal timelines.

- All transcripts must be ordered. The court reporter will a stenographer's certificate to confirm.

- Motions: A motion to order late transcripts should specify dates and reporters. A motion may also be filed to extend the time to file a transcript; attach the stenographer's certificate.

- Missing Transcripts: May file motion to compel or extend brief deadlines.

- Federal System Comparison: Federal appellate timing procedures are perceived as more transparent.

- COA Mediation: Parties may opt out.

- Late Briefs: Filing late may lead to forfeiture of oral argument—even if the brief is later accepted.

- Daily transcripts that a court reporter might provide during a trial are not the official transcripts for use on appeal.

e) Consolidated cases

- The court rules don't provide any guidance on cases that are consolidated in the trial court.

- But there is case law establishing that consolidated cases keep their own identity for purposes of appeal.

f) Helpful tips

- Be on the lookout for a disappearing defendant
  - A disappearing defendant is one that was dismissed early on and deleted from the caption.
  - Caption must list every party when there are multiple parties.
  - Caption may not use "*et al*."
  - Refer back to the official Register of Actions (not case details on website).

- An entry of default is not the judgment. Need a default *judgment* to appeal.

- When filing the claim of appeal, attach the final order and not all of the orders dismissing random defendants. Just give one order that satisfies the definition of the "final order."

- When stipulating to dismiss so that parties may pursue an appeal, preservation language must appear in language of the stipulation.

- If you only put one name in the "appellant" line then only that party is claiming appeal. Make sure you list it out.

- When jurisdiction is unclear, note it in the claim of appeal.

- If opposing appeal, wait two weeks before filing a motion to dismiss.

- Cite the statute or rule giving the right to claim of appeal
  - If a statute gives an appeal of right, look at the timing that the statute provides. Some are sooner than 21-days.

- Be as complete as possible. Hard to open an appeal, if you don't have all of the documents.

- Defect letters help the clerks stay organized; keeps the case flagged for the court.

- Make sure you keep your MiFile updated with your correct email.

g) Action items and recommendations

- Participants agreed that it would be useful to have a rule about updating MiFile.

- Clarify the use of stipulations in generating final orders.

- Encourage consistent interpretation of reconsideration appeal rules.

- Improve public understanding of timing rules via the COA website.

- Train practitioners on transcript ordering and designation practices.

- Explore potential improvements to state timing notices, mirroring federal procedure consistency.

6. Behind the Curtain: An Inside Look into Court of Appeals' Processes for Panel Assignments

a) Assignment overview

MCR 7.201(E) states that the Chief Judge of the Court of Appeals has the responsibility to assign judges to panels and decide which cases are assigned to those panels before the calendar for each session is prepared.

MCR 7.201(D) specifies that panels should be assigned such that Judges sit with each other equally. This rule prevents the Chief Judge from assigning judges to panels based on pure random selection, because this would not take into account the ban on having Judges sit with each other equally.

The Chief Clerk then explained the basic process for panel assignments:

- Because Judges are allowed one month of the year where they do not sit on a panel for case call, they are required to inform the Clerk of their availability for the following year in October

- Once the Clerk has all Judges' availability, they input this availability into the system to determine how many panels can be seated in each month (August and September tend to have the fewest number of Judges available and, as a result, the fewest number of panels)

- All of this information is put into the Court's Case Management System, which uses an algorithm to "spit out" a calendar. This algorithm takes into account the Court's attempt to prevent a Judge from sitting more than twice a year with any other judge, as well as ensuring the location of the panel assignments makes logical sense (i.e. not having a Detroit Judge sit in Grand Rapids for all of their panel assignments)

- Once the calendar is produced, the Clerk looks for any anomalies and fixes them (this is the only "human touch" in the production of the calendar – everything else is done by the Case Management System)

- The Chief Judge is then presented the calendar for approval

- The finalized and approved calendar is then sent out to the Judges in late October, so they will know their panel assignments for the entire year

When the calendar is sent out to the Judges, it is essentially "set in stone" outside of any conflicts that may arise later in the year. Judges do have the option to "swap" with other Judges if they have a conflict. This is where you may see one Judge sitting with another Judge more than twice in a calendar year.

Question: Someone asked whether the algorithm tracks year-to-year, i.e. if a Judge sits with another Judge often in 2024, will the algorithm assign them to sit on the same panel less the following year? The answer was previously no, but the Clerk informed us that starting this year, they will be taking into account the prior two years in the algorithm when setting panels.

Other things that are taken into consideration when making panel assignments:

- Court of Claims Judges are given a 20% reduction in the amount of work they receive

- When there is a full bench, 25 judges are not evenly divisible by 3, so there are often 8 panels with one "extra judge." This extra judge will get cases without a research report and carry those cases forward to the next month, in addition to their other assigned cases.

Question: Someone asked whether the Court planned to continue the Northern Michigan case call twice a year. The Clerk said it is unlikely, because it is difficult to find enough cases to make it worthwhile to go up to Marquette or Petoskey. He noted that they plan to keep the option open, but there is unlikely to be a Northern Michigan case call in the next few years.

- It was also noted that they still plan to continue off-site arguments in places like law schools (Wayne State Law, U of D), but this is often based on professors or other faculty reaching out to the Court directly to arrange.

b) How are cases assigned to panels?

Approximately five weeks prior to the next month's case call, Judges will receive their cases for that month (for example, Judges received their June cases approximately 5 weeks prior to the beginning of the June case call).

Each month there is what is called a "load date," which is the date where cases that are ready with reports from the research attorneys are added to the "pool" of cases ready for hearing. On the "load date," the Clerk uses the number of cases ready for hearing to determine how many cases will be assigned to each panel that month.

The cases in the "pool" are also given a difficulty evaluation from 1-6. The total number of points in the "pool" are added up and divided by the number of panels to determine how many "points" each judge can be assigned in any given month.

- For example, if there are 600 points total in a pool and 18 Judges, each Judge can be assigned 20 points for that case call (or 16 points for Court of Claims Judges)

Once the number of points for each judge is calculated, the Case Management Software pulls cases at random to reach the total number of points for each Judge. The Clerk then reviews the assignments to make sure nothing is "out of whack" and makes any small adjustments (i.e. if one Judge on a panel has 5 cases and another has 8, they can try to even it out). Once the computer spits out assignments, however, the Clerk emphasized that they try to do very little moving of cases, and almost never move cases to a different panel entirely.

For each month, the timing is as follows:

- **Friday:** "Load date"

- **Monday:** Case Management Software produces a list of tentative case assignments

- **Tuesday:** Case assignments are finalized

- **Wednesday morning**: Case assignments are sent to Judges by email, and the Judges can then pull all the briefs and other materials, as well as notify the Court if there are any conflicts that were missed in the prior conflicts check

- **Thursday:** Case call notices are sent out to Attorneys/Parties

Question: Someone asked whether the Clerk attempts to balance the number of civil and criminal cases assigned to a Judge? What about balancing certain topics (i.e. balancing the number of tax or real estate cases a Judge receives)? The Clerk's office only balances civil and criminal. Criminal cases are put at the beginning of the case call for logistical reasons.

Question: Someone asked where attorney vacation letters fit into this process? What is the recommended time frame to submit vacation letters? Recently, the Clerk's Office has changed the timing of notice letters being sent out to Attorneys/Parties. Now, cases sit in the "warehouse" until they are sent to the research attorneys. The notice is now sent out to Attorneys when cases are sent to research, which means it is closer to the time when the case will be assigned to a case call. Once you receive the notice that the case "could be assigned to a future case call" you should inform the Court of any conflicts as soon as possible.

- NOTE: If you are the Attorney of Record on a case and submit a vacation letter in one case, that vacation letter will apply to all your other pending cases

- NOTE: Attorneys are barred from submitting vacation letters for two back-to-back months, but the Court may make limited exceptions for medical reasons, etc.

- If something later comes up and an attorney needs a slight adjustment (i.e. cannot attend Argument on a Tuesday of case call, but could attend on Wednesday) the attorney should contact opposing counsel first, and then contact the Court to see if a switch would be possible. In limited emergency situations, the Court may also permit attorneys to argue remotely.

Question: Someone detailed a situation where they had several cases that were not consolidated but were related, and the cases were assigned to the same Judge or Judges – was this a coincidence? Yes. The Clerk's office doesn't know what cases are about, so there is no way for them to know what cases are related, especially over a period of years.

- NOTE: There is a "Consolidation Lite" process, where cases are informally joined together once they get to Research, so one attorney will work on cases with very similar issues – the Research Attorney can then flag that the issues are so similar that they should be assigned to the same panel. If this happens, the cases will be flagged to "submit with" each other, and will be argued to the same panel (although not formally consolidated)

Question: Someone asked whether a Judge can request to hear a certain type of case? No. The Clerk's Office has never received this request, and it wouldn't be allowed even if a Judge asked.

Question: Someone asked when a case is assigned to a panel but the case is later adjourned, does it stay with the same Judge and just move to their next panel? Not typically. Judges are assigned cases each month that have research reports, as well as cases that do not have a report ("no-report cases) (these are assigned 2 months ahead of case call). If a Judge has a "no-report" case that they have done a lot of work on, however, the Court may let them keep the case after it is adjourned and take it with them to the next panel.

Question: Someone asked what happens to cases that are remanded to the Court of Appeals from the Supreme Court? Generally, if the Court of Appeals panel issued an opinion, the case will go back to the same three Judges who issued that original opinion. In certain circumstances (such as cases that are remanded after several years), the Court may assign a substitute Judge to take the place of the missing Judge. Typically, if there are two of the remaining Judges left, they will make a decision. However, if they cannot agree, the Chief Judge will do a random draw and assign a third judge to sit.

Question: Someone asked how the Court comes up with difficulty assessments for a case? This is done using certain metrics, including the number of issues, whether there are any issues of first impression, the size of the record, and the length of the transcripts. The Research Supervisors also have a lot of experience, and they often can base their rating on their experience with similar cases in the past. "It's an art, not a science."

- Back in the 1990s, the Clerk's Office would give each panel a certain number of cases without analyzing their difficulty. They have moved away from this practice to try to equalize the work across panels now.

Once a case is ready for research, it will sit in the "warehouse" until the Research Department is ready to take the case. Each month the Research Department will pull the next group of cases from the top of the "warehouse" and screen those cases. The Research Department then assigns a "day evaluation" to each case – this seeks to estimate how many days it will take a Research Attorney to produce a full report (this can be anywhere from 2 days to 43 days).

- NOTE: This is different from the difficulty points assigned to the case after the Research Supervisor reviews a report.

- This rating is also used to find cases within the "4-day" window to assign to Judges without a report (lately they have been using more criminal cases as "no report" cases)

Question: Someone noted that the Sixth Circuit publishes a Journal each month which discusses the status of cases, including how fast the Court is moving on certain types of cases, which District Courts are being appealed the most, etc. They asked whether the Court of Appeals has ever thought about publicizing a journal detailing which cases are waiting on briefs, waiting on panel assignments, etc.? Chief Clerk said this has never been raised before and they have not discussed this internally, but it could be a possibility in the future (although it would be difficult given the sheer number of cases pending at any given time).

c) Addressing conflicts of interest

- Judge can put a case into the system as to which they feel they may have a conflict.
- Parties can raise potential conflicts.
- If a new judge recently left a firm, he or she may be disqualified from the firm's filings for a year or so.
- Almost every month a judge finds something.
    - Report to chief judge
    - Chief judge finds a sub for that one case, and that judge gets that one case and then leaves the panel
    - Judge sitting on another panel in the same city is generally who subs in.

d) Motions to adjourn

- May seek to move argument to a different day during the same call
- But the Court does not like to adjourn cases to a different call unless really necessary
- Request sent to the judges and they have to agree to adjourn

e) Assignment of motion panels

At the same time the Clerk's Office works on the annual case call calendar, they also work to put together the motion calendar. In a very similar way as the case call calendar is produced, the algorithm "spits out" four motion panels each month (one for each District).

- NOTE: it used to be that the Judges in each District would only hear motions from that District. Now, Judges are randomly assigned to motion dockets.
- NOTE: The algorithm for motion panels does not consider some of the other factors, such as one Judge not sitting on the same panel as another Judge more than once. It truly just "spins the wheel" and assigns Judges randomly.

Once motion panels are assigned, each Tuesday the District offices put together a package that includes any applications that have come from the District Commissioners with completed reports, as well as any other motions that have been submitted. This package is then electronically submitted to the Motion Panel with all supporting documents.

Question: Someone asked how a motion gets assigned to a panel? This is not the same as assigning cases, and there is no difficulty scoring. Rather, whoever happens to be on the motion panel for that month receives any motions that have been submitted. The notice date for motions is always a Tuesday (except for holidays).

The Court has two types of "General" Motion Panels = "Regular Motion Docket" Panels and "Administrative Motion" Panels.

- Administrative Motion Panels decide motions for extension of time and other motions that generally can be decided by one Judge.
- There is also a "Quarterly Panel" that hears motions for reconsideration on dismissals for lack of jurisdiction.

If there is an emergency motion filed, the monthly motion panel may receive that motion on a different date (not a Tuesday)

Question: Someone asked if there is a Judge who is assigned to motion panel and a case call panel, are they responsible for their case call cases and then every Tuesday of that month a new batch of motions and applications, as well as emergency applications? Yes.

Question: Someone asked how expedited cases are handled? By court rules, certain case types are "expedited" from the get-go, once the briefs are filed and they get lower court file, they do not go to warehouse they go straight to research and jump over 2-3 month delay. This includes FOIA cases, as well as others under the Court Rule.

- Some cases actually involve an expedited briefing time set by Court Rule.
- Expedited cases usually are decided in 9-10 months, whereas regular civil cases are usually decided in 15 months.

Question: Someone noted that the Court Rule states that a litigant has a right to have oral argument in front of three Judges – they asked what happens if a Judge has an emergency and cannot appear on the case call date? Can the litigant ask for

a hearing before three Judges? It is the Court's policy that if a Judge cannot be available, the presiding Judge on a panel will say before they start "Judge x cannot be here today, if you object to that let us know ahead of time" They also inform litigants that the missing Judge will listen to the recorded arguments after the fact. To the Clerk's knowledge, no one has objected to this. If they did object, the case would go back to the "warehouse."

f) Emergency panels

There are certain emergency situations, including election law cases, where the Court will convene an emergency panel. When an election law case comes in, internal Court procedures say that they will draw a random panel. The Clerk's Office will ask the Case Management Software to "spin the wheel" and generate a random panel of three Judges (taking conflicts into consideration).

For Claims of Appeal or Applications that are challenging a lower court's decision on an emergency basis, the Commissioners will receive these and let the current motion docket panel know that there is an emergency that needs to be handled.

- The regular motion panel can request that the Clerk's Office draw a random panel to decide an emergency case, but this does not happen often

Conflict Panels are relatively rare, although they have now had two in the last 12 months. Conflict panels occur when Judges send their opinion on a case to the opinion clerk and check the box indicating "this is a conflict opinion" (i.e. there is an identified conflict with a prior authority and "but for that prior authority our opinion would have gone the other way").

The process for convening a Conflict Panel is set out by Court rule. Immediately after issuing a conflict opinion, the Judges are polled to ask if they want to form a conflict panel to reconcile any differences between the prior opinion and the current opinion (asked – (1) do you recognize a conflict? (2) should we convene a panel?). If the Judges vote to convene, the case call coordinator generates a 7-Judge panel without the Judges that issued the original opinion. One Judge is selected to preside (along with an alternate) and the case is turned over to the panel. The Conflict Panel then internally confers and circulates a draft opinion for a vote. When they have reached a decision, the presiding Judge of the Conflict Panel files the opinion with the opinion clerk.

C. Family

1. The "New" Custody Final Order Rule 6 Years Later: What the Case Data Tells Us About Its Impact

a) Final Order Rule

(1) Defining a postjudgment final order.

"What is a final order?" has been a question for family law attorneys and parties under various court rules since the mid 1990s.[1] The current rule MCR 7.202(6)(a)(iii), amended in 2019, defines certain postjudgment child-related as final orders appealable by right:

> (iii) 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.

The subrule was amended to provide a clearer (and narrower) definition of postjudgment final orders in domestic relations cases. But it is not a bright-line rule. There are arguments as to what constitutes a change in legal or physical custody, for example. Custody cases are fact-specific and it is the effect of an order – not simply a title of a motion or order – that controls. There are circumstances where a change in parenting time may be a change in a child's custody/established custodial environment.

When in doubt, file a claim of appeal with a statement as to why your filing is a postjudgment appeal of right under MCR 7.202(6)(a)(iii). If dismissed, there is the option of a jurisdictional reconsideration motion in the Court of Appeals, which is free, and/or the option of an application to the Supreme Court raising the interpretation of the court rule.

In the past, under different iterations of the domestic relations final order rules, attorneys would simultaneously file both a claim of appeal (with a statement as to why the case was appealable by right under the existing court rule) ***and*** an application for leave to appeal. The application was often granted and occasionally a claim would be accepted.

(2) See 2025 Family Law Materials re: final orders in domestic relations actions.

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[1] There was a lengthy general discussion concerning final orders earlier in one of the plenary sessions and some of the same attendees were at this Breakout. This report summarizes the discussion and suggestions at the session.

b) Applications for Leave to Appeal

(1) Appeal of Right or Application

An application is an option, for example, if a judgment is bifurcated (i.e. not final because it is missing a provision or one of the judgment requirements, such as a child or spousal support determination, is pending) and a party needs to appeal a child custody provision immediately. This is a time sensitive situation. It may make sense to file an application with an IC (immediate consideration) motion instead of waiting for the judgment to be finalized.[2] This is highly case specific and would depend on how quickly the judgment can be made final. This approach leaves presents risks for a later appeal of right if the application is denied and considered preclusive. There was some discussion of court rule amendments to address this situation, including making child custody provisions appealable by right even if the entire judgment is not final.

(2) Discussion of Delayed Applications

Many postjudgment domestic relations orders are not appealable by right. Family law attorneys often file delayed applications for leave. They need transcripts in these factually-dense cases to best support arguments. This approach also respects the courts and the opposing party as well as the substance of the appeal. You are putting the case fully in front of the court and the other side has the information for their response.

c) Motions for Immediate Consideration and Stay

(1) Applications

Unless a party needs a decision before 21 days, it is better form wait to file an IC motion until after the answer period is over. Again, this is courteous to other side. If there is no response, the opposing party has had a chance to respond.

(2) Delayed Applications

Whether to file an IC motion with a delayed application is also a fact-specific decision. Generally, it is not done– but there may be something that is happening at the trial court level or some trigger point that may make an IC motion appropriate.

[2] There was some discussion in this and the previous plenary session of the Court making inconsistent decisions in determining when a judgment is final – specifically as to the required support language for final judgment required in the MCR 2.311(D).

2. Hot Issues in Family Law Appeals: Whatever Happened to Peremptory Reversal? Why Can't I Get Timely Transcripts? When to Use and Not to Use Immediate Consideration Motions

****See materials attached at Tab B**

D. Child Welfare

1. Top 20 Child Welfare Appeal Cases

****Additional materials attached at Tab C**

In re Sanders (Individual Adjudication)
495 Mich 394 (2014)
Prior to *In re Sanders*, we had the one-parent doctrine which allowed the court to obtain jurisdiction over a child based on the adjudication of one parent yet enter dispositional orders regarding both parents. *In re Sanders* eliminated the one-parent doctrine and held that such a doctrine impermissibly infringes on the fundamental rights of unadjudicated parents without providing adequate process. *In re Sanders* held the one-parent doctrine unconstitutional. Due process demands procedural protections (e.g., adjudication) before the state can infringe on a fundamental right.

In re Lange (Neglect and Children with Severe Mental Health/Behavioral Problems)
MSC #166509 (April 14, 2025)
In this case, the child had been hospitalized because he had done and said threatening things. The hospital wanted to discharge him, but the mother persisted that the hospital had not done enough to help him. Mother refused to pick him up from hospital because of risks to the child and the household. The hospital called Children's Protective Services. DHHS filed for neglect. The trial court declined to take jurisdiction. COA reversed, and MSC agreed with the trial court. The mother had worked diligently to seek help for the child. She did not have the power, skills, or resources to help fix the child's mental state and behaviors.

This was not neglect as defined in MCL 712A.2(b)(1). Neglect requires that a parent must first have the ability to provide the necessary care and support.

> Ability: "having sufficient power, skill, or resources to do something."
>
> Neglect under MCL 712A.2(b)(2) involves "negligent treatment": failing to exercise the care expected of a reasonably prudent person in like circumstances.

There was conversation regarding what to do in these circumstances. Someone suggested the hospital should have requirements before simply discharging a child with mental health and behavioral issues.

It was mentioned that MCL 712A.2(b)(3) is not applicable to these circumstances. MCL 712A.2(b)(3) applies more to sex trafficking. It was suggested that perhaps MCL 712A.2(b)(3) should be expanded to cover cases involving mental health and behavioral health issues in adolescents. One person cautioned expanding MCL 712A.2(b)(3) as often these children need more parent involvement, opposed to being placed with the agency.

In re Dearmon (Evidence at Adjudication)
303 Mich App 684 (2014)

Prior to this case, only evidence which occurred prior to the petition being filed could be introduced at adjudication.

This case held that evidence arising after a petition is filed may be presented at adjudication if relevant to the allegations within the petition and notice has been provided to the respondent.

In this case the petitioner alleged the respondent would not leave a violent relationship that endangered the children. The respondent claimed she was not having contact with the abuser. The abuser was in jail. The jailhouse telephone audio calls, which occurred after the petition was filed, were introduced as evidence of respondent's intent to continue a relationship with the abuser.

In re Brock (Cross-examination and Privilege)
442 Mich 101 (1993)
Relevant information that would perhaps otherwise be privileged is admissible in a child protection case (MCL 722.631)

Alternative questioning methods, such as an impartial examiner and video deposition, are allowed if regular questioning is found likely to be harmful to the child witness. See MCL 712A.17b(13) and MCR 3.923(F).

The right to cross-examination is not absolute. There is no right to confront a witness because the matter is not criminal. Both sides can submit questions, but an examiner need not ask all of them or follow the wording exactly. Traumatizing witness likely to result in poorer truth-seeking, thwarting the goals of cross-examination.

In re Pederson (Plea: Advice of Rights) 311 Mich App 445 (2020)
This case clarifies the relevant portions of *In re Ferranti*, 504 Mich. 1 (2019). In *In re Ferranti* the trial court failed to advise the respondents of "any" of the

waived rights enumerated by MCR 3.971(B)(3) or (B)(4). In *In re Pederson*, the trial court advised respondents of most of the rights listed in MCR 3.971, however, the trial court failed to advise them that their pleas could "later be used as evidence in a proceeding to terminate parental rights...." No written advice of rights
form appeared in the record. Thus, the trial court erred by failing to properly advise respondents as required by MCR 3.971(B)(4) that their pleas could "later be used as evidence in a proceeding to terminate parental rights." The COA held that the error was not outcome-determinative.

Partial omissions of the advice of rights in MCR 3.971(B) do not necessarily require reversal. Facts and degree of harm must be carefully considered.

MCR 3.971(B)(3) provides the due process protections at the adjudication stage. Errors could well require reversal.

MCR 3.971(B)(4) says plea a may be used against respondent in a subsequent TPR proceeding. COA will weigh harm of the error & TPR grounds the court relied upon.

In re Walters (TPR at Initial Disposition/Aggravated Circumstances/Safety Plans & Due Process) COA #369318 (Jan. 2, 2025)
Agency must make reasonable efforts unless aggravated circumstances exception in MCL 712A.19a(2) applies.

TPR at initial disposition is not permitted unless there are aggravated circumstances. An aggravated circumstances finding requires clear and convincing evidence.

See order in *Simonetta II*, 507 Mich. 943 (2021).

The agency can use a verbal safety plan but the agency cannot use this verbal plan to allege violations of the same. A pre-petition verbal safety plan is insufficient on due process grounds (notice) as basis to proceed to TPR.

*** *In re Barber / Espinoza Minors*, MSC Case No. 167745, is pending before the MSC and could change the holding in this case.

In re France
(Anticipatory Neglect)
306 Mich App 713
(2014)
"Anticipatory neglect" only applies if kids are similarly situated. Otherwise, too speculative. Need greater showing of risk or harm.

Here, jurisdiction was based on fathers failure to recognize infant's serious illness and get treatment. The trial court ordered TPR regarding the infant and three older children based on anticipatory neglect even though there were no allegations of maltreatment of the older children. The COA rejected the trial court's reasoning due to dissimilar circumstances of the older kids and infant. How a parent treats one child may not be dispositive of how that same parent treats other children.

Also limited application of MCL 712A.19b(3)(b)(ii), failure to prevent *intentional* actions.

- Parent w/ opportunity to prevent injury or abuse failed to do so and there is reasonable likelihood of further injury if placed in the home.

In re Jackisch/Stamm – Jackisch (Domestic Violence) 340 Mich App 326 (2022)

The fact that a respondent is/was a victim of domestic violence may not be relied upon as a basis for TPR. We cannot TPR because there is a mere presence of domestic violence in the home or someone has not been able to remove themselves from the domestic violence. If a respondent was the perpetrator of domestic violence, that is an appropriate concern. If respondent's own behaviors directly harmed the children or exposed the children to harm, that's an appropriate concern.

In re Rood (Notice and Reasonable Efforts) 483 Mich 73 (2009)
Parents must have notice of proceedings, an opportunity to be heard, and an opportunity to participate in the case, including services.

There is a constitutionally-protected liberty interest of parents in the care, custody, and management of their children. There is a right to notice and a right to be heard.

In this case the agency and the court had the correct address for the father but mailed documentation to the wrong address. They also had the correct telephone number for the father but made little attempt to call him but when they tried, they did not dial the correct number. A service plan was also not provided to the father.

A service plan is essential to reasonable efforts.

In re Mason (Incarcerated Parents and Reasonable Efforts) 486 Mich 142 (2010)
Incarcerated parents must have an opportunity to participate in proceedings and the reunification process. Mere incarceration alone is not a sufficient reason for TPR. Criminal history alone also does not justify TPR.

If a child is placed with a relative, the court must consider that placement in the best interest determination for TPR.

A failure to make reasonable efforts creates "a hole in the evidence," rendering TPR premature. Court appearance may be by phone. MCR 2.004 (MDOC custody).

In re D.M.A.N. (Placement with Relatives)
COA #364518, 364520 (Feb. 21, 2025)
Conditional reversal of TPR decision for failure to investigate possibility of relative placement.

A relative placement would impact a best interests determination. A child has a right to relative placement if it is safe and available.
If no suitable relatives found on remand, TPR order stands. If suitable relatives are found and child placed with a relative, the trial court must determine whether TPR is still in the child's best interest.

After removal, the child was placed with the maternal grandmother. There were suspicions that the grandmother was couching the child. The department did not look into other relatives even though multiple relatives expressed interest in caring for the child. This conduct fell afoul of DHHS's statutory duties and put at risk the child's right to maintain a relationship with safe relatives.

In re JK (Treatment Compliance and Adoption) 468 Mich 202 (2003)
Compliance with a parent-agency treatment plan is evidence of the ability to provide proper care and custody.
Note: compliance and benefit required. *In re Gazella*, 264 Mich. App. 668, 692 N.W.2d 708 (2005). Agency must create a plan that is adequate to address its concerns. Failure to do so is the agency's problem.
Don't compare foster homes and parental homes when deciding statutory TPR grounds. No adoption can be ordered if an appeal is pending.

In re Hicks/Brown (Disability) 500 Mich 79 (2017)
Agency services must accommodate disability pursuant to Americans with Disabilities Act if agency is or should be aware of disability. In this case, it was clear that the Department had knowledge of respondent's disability.

If reasonable accommodation was not provided, then the agency cannot claim that reasonable efforts were made and TPR is improper.

Old rule about timeliness of request for accommodations cast into serious doubt. Court dismissed it as dicta from COA case (*In re Terry*, 240 Mich. App. 14 [2000]). Old rule was that request must be made when initial service plan adopted or shortly thereafter.

In re Morris (ICWA Notice and Remedy)
491 Mich 81 (2012)
If the court receives information about any criteria on which tribal membership can be based, notice to tribe and/or BIA is required. Parents cannot waive notice requirement or child's membership because that would waive tribe's rights.

File the notice and return receipt of proof of service with the court. The remedy for the notice violation is a "conditional reversal." If the child is ICWA eligible, reverse and pursue ICWA- compliant proceedings. If not, the 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 JL (Active Efforts under ICWA)
483 Mich 300 (2009)
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.

The ICWA does not categorically require the DHHS to provide services each time a new termination proceeding is commenced against a parent.

At trial there was testimony regarding the extensive services provided to respondent from 1999 to 2005 and despite these services, the respondent failed to become an adequate parent.

- The 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.
- Active efforts must be culturally appropriate.
- Active efforts must permit a current assessment.

In re White (Best Interest Findings) 303 Mich App 701 (2014)
This case clarified *In re Olive/Metts*, 297 Mich. App. 35 (2012).

If the best interests of individual children differ significantly, the court should address those differences in determining the best interests. But no need for redundant findings. For best interests, consider, in part, 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, etc.

In re A.P. (Child Custody and Child Welfare)

283 Mich App 574 (2009)
Juvenile court orders supersede custody orders. They don't modify or terminate them. An existing custody order goes dormant during juvenile proceeding. Custody order becomes active again when the juvenile case is dismissed. The judge presiding over juvenile cases can hear custody matters.

A child has a due process liberty interest in family life. A right to proper and necessary support, education, and care. In other words, the right to have a fit parent.

In re Beck (Child Support)
488 Mich 6 (2010)
TPR does not end child support obligation. The sole parental obligation defined by statute is the obligation to support the child. MCL 722.3.

Parental rights and parental obligations are different. 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 (Funding for Experts) 314 Mich App 111 (2016)
Courts must give respondents reasonable funds for expert consultation if there's a nexus between the respondent's request and the issues presented and there is a reasonable probability that an expert would be of meaningful assistance.

- Seriously ill infant ended up comatose.
- Radiologists at one hospital found no sign of trauma on MRI and CT of brain.
- Radiologists at another hospital read same scans and found signs of prior trauma.
- TPR petition filed. Parents moved for funds for expert given conflict between doctors. Trial court denied. TPR.

Here, conflict between doctors about complex evidence made expert witness funds necessary. Must use *Mathews v. Eldridge*, 424 U.S. 319 (1976), analysis because "due process is flexible and calls for such procedural protections as the particular situation demands."

COA analyzed DP under *Mathews v. Eldridge*, 424 U.S. 319 (1976).

- Private interest of parents here is commanding. The state shares the parents' interest in ensuring an accurate and just decision.
- Risk of error is very high if parents are not allowed funds for expert given complexity of evidence.
- The government's interest in saving money is not substantial enough given the stakes to deny these funds to parents.

In re Ballard (Parenting Time in Juvenile Guardianships)
323 Mich App 233 (2018)

MCL 712A.19a(14) provides the trial court with authority to order parenting time after a juvenile guardianship has been established. The court can increase, decrease, or terminate parenting time over course of guardianship.
In re Prepodnik, 337 Mich. App. 238, 975 N.W.2d 238 (2021): holds that courts can also grant grandparenting time under MCL 722.27b in JG cases. A parent must meet requirements in MCL 722.27b, and the guardian is not entitled to the presumption given to a fit parent in a decision to deny grandparenting time.

A juvenile guardianship is permanent. We must advise parents and guardians that the guardianship is permanent.

Additional Cases:

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

In re KH, 469 Mich 621 (2004): Can't terminate a putative father's parental rights, because he doesn't yet have parental rights to terminate.

In re Knipp, COA #368780 (May 23, 2024): Clock on desertion started running when putative father abandoned child, not when he perfected paternity.
See: In re LE, 278 Mich App 1 (2008):
actions prior to perfecting legal paternity may be considered for TPR.

2. Reasonable Efforts and Ferranti Appeals: Focusing Appeals on Issues that Matter

****Additional materials attached at Tab D**

Elizabeth McCree held multiple polls during her session to engage the audience. Each question provided the audience with a scenario and then required the audience to select the best "reasonable efforts" for that scenario. Elizabeth discussed real issues in child welfare law and the audience was able to hear real experiences and real solutions to common problems which are repeated too often in child welfare proceedings.

Her written materials included some of the important holdings from *In re Ferranti*, 504 Mich 1 (2019):

- "This Court's decision in *In re Hatcher*, 443 Mich 426 (1993), generally bars a parent from raising errors from the adjudicative phase of a child protective proceeding in the parent's appeal from an order terminating his or her parental rights. The Hatcher rule rests on the legal fiction that a child protective proceeding is two separate actions: the adjudication and the disposition. … **Hatcher was wrongly decided, and we overrule it**." Ferranti, 504 Mich at 7-8.

- "… **the trial court violated the respondents' due-process rights by conducting an unrecorded, in camera interview** of the subject child before the court's resolution of the termination petition, a different judge must preside on remand." Ferranti, 504 Mich at 7-8.

- "In taking the respondents' pleas, **the court did not advise them that they were waiving any rights. Nor did the court advise them of the consequences of their pleas**, as required by our court rules. See MCR 3.971.

- "… **the court did not advise the respondents that they could appeal its decision to take jurisdiction** over [the child]." Ferranti, 504 Mich at 9-10.

Additionally, Elizabeth suggested that a new practitioner, or a seasoned one, could look to *In re Ferranti* for a helpful analysis of child welfare proceedings in general.

In ***In re Ferranti***, 504 Mich 1 (2019), the Michigan Supreme Court made multiple substantive rulings, each of which could present viable appeal issues in child protective proceedings. These issues should be preserved in the trial court by appropriate objections, motions in limine, offers of proof, or some other manner of making the record.

In child protective proceedings, all parties, including the child through the Lawyer Guardian Ad Litem (LGAL), may make a number of arguments using *Ferranti* as authority.

***

Some of the important *Ferranti* rulings include the following:

"This Court's decision in *In re Hatcher, 443 Mich 426 (1993)*, generally bars a parent from raising errors from the adjudicative phase of a child protective proceeding in the parent's appeal from an order terminating his or her parental rights. The *Hatcher* rule rests on the legal fiction that a child protective proceeding is two separate actions: the adjudication and the disposition. … ***Hatcher* was wrongly decided, and we overrule it**." *Ferranti*, 504 Mich at 7-8.

"… the **trial court violated the respondents' due-process rights by conducting an unrecorded, *in camera* interview of the subject child** before the court's resolution of the termination petition, a different judge must preside on remand." *Ferranti*, 504 Mich at 7-8.

"In taking the respondents' pleas, **the court did not advise them that they were waiving any rights**. **Nor did the court advise them of the consequences of their pleas**, as required by our court rules. See MCR 3.971.

"… **the court did not advise the respondents that they could appeal its decision to take jurisdiction** over [the child]." *Ferranti*, 9-10.

****

In addition to the above holdings, in *Ferranti*, the Michigan Supreme Court also provided a helpful overview of child protective proceedings:

Child protective proceedings are governed by the juvenile code, *MCL 712A.1 et seq.*, and Subchapter 3.900 of the Michigan Court Rules. Any person who suspects child abuse or neglect may report their concerns to the Department. *MCL 712A.11(1)*. The Department, after conducting a preliminary investigation, may then petition the Family Division of the circuit court to take jurisdiction over the child. *MCR 3.961(A)*. That petition must contain, among other things, "[t]he essential facts" that, if proven, would allow the trial court to assume jurisdiction over the child. *MCR 3.961(B)(3)*; see also *MCL 712A.2(b)*. After receiving the petition, the trial court must hold a preliminary hearing and may authorize the filing of the petition upon a finding of probable cause that one or more of the allegations are true and could support the trial court's exercise of jurisdiction under *MCL 712A.2(b)*. See *MCR 3.965(B)*.6. *Ferranti*, 14-15.

If the court authorizes the petition, the adjudication phase follows. The question at adjudication is whether the trial court can exercise jurisdiction over the child (and the respondents-parents) under *MCL 712A.2(b)* so that it can enter dispositional orders, including an order terminating parental rights. See *Sanders, 495 Mich at 405-406*. The court can exercise jurisdiction if a respondent- parent enters a plea of admission or no contest to allegations in the petition, see *MCR 3.971*, or if the Department proves the allegations at a trial,

see *MCR 3.972*. "If a trial is held, the respondent is entitled to a jury, the rules of evidence generally apply, and the petitioner has the burden of proving by a preponderance of the evidence one or more of the statutory grounds for jurisdiction alleged in the petition." *Sanders, 495 Mich at 405* (citations omitted). And "[w]hile the adjudicative phase is only the first step in child protective proceedings, it is of critical importance because the procedures used in adjudicative hearings protect the parents from the risk of erroneous deprivation of their parental rights." *Id. at 405-406* (quotation marks, citation, and brackets omitted). **The adjudication divests the parent of her constitutional right to parent her child and gives the state that authority instead**. *Ferranti*, 14-16.

Once the trial court's jurisdiction is established, the case moves to the dispositional phase. In this phase, the trial court has "broad authority" to enter orders that are "appropriate for the welfare of the juvenile and society in view of the facts proven and ascertained." *Id. at 406*, quoting *MCL 712A.18(1)*. During the dispositional phase the court must hold review hearings "to permit court review of the progress made to comply with any order of disposition and with the case service plan [i.e., the family treatment plan] . . . and court evaluation of the continued need and appropriateness for the child to be in foster care." *MCR 3.975(A)*. If the child is removed from the family home, the court must conduct a permanency planning hearing within 12 months from the date of removal. *MCL 712A.19a(1)*; *MCR 3.976(B)(2)*. This hearing results in either the dismissal of the petition and family reunification, or the court ordering the Department to petition for the termination of parental rights. *MCL 712A.19a(4)*; *MCR 3.976(A)*. *Ferranti*, 14-16.

If the Department files a termination petition, the court holds a termination hearing. See *MCR 3.977*. The court acts as fact-finder, *MCR 3.977(I)*, and the rules of evidence generally do not apply, *MCR 3.977(H)(2)*. If the court determines by clear and convincing evidence that one or more statutory grounds for termination exist, see *MCL 712A.19b(3)*, the court must enter an order terminating the respondents' parental rights unless the court determines that termination is clearly not in the child's best interests. *In re Trejo, 462 Mich. 341, 344 (2000)*. *Ferranti*, 14-16.

3. The Appellate Landscape for Incarcerated Parents: Reflections on 15 years of *In re Mason*

a) In re Mason

In ***In re Mason***, 486 Mich 142 (2010), the Michigan Supreme Court considered the case of an incarcerated parent's ability to provide proper care and custody of his child via designating a fit and willing relative to care for the child during the term of incarceration. The Supreme Court ruled that a parent's incarceration – standing alone – is not sufficient basis for a trial court to terminate the parent's rights.

Thus, the Michigan Supreme Court reversed the judgment of the Court of Appeals, which affirmed the circuit court's order terminating the parental rights of Richard Mason, the respondent father to his two sons. The Supreme Court found that the circuit court had committed several legal errors and that the Department of Human Services (now, DHHS) failed in its duties to engage respondent in the proceedings against him.

First, the court and the agency **failed to facilitate respondent's participation in the child protective action by telephone in light of his incarceration**, as required by MCR 2.004.

The Court found that the agency further **abandoned its statutory duties to involve him in the reunification process and to provide services** necessary for him to be reunified with his children.

The Supreme Court found that the trial court effectively **terminated respondent's parental rights merely because he was incarcerated** during the action without considering the children's placement with relatives or properly evaluating whether placement with respondent could be appropriate for the children in the future.

*****

Since *Mason* was decided 15 years ago, there have been many Court of Appeals decisions applying the mandate for trial courts to consider a child's placement with relatives before terminating a parent's rights. The holdings in Mason and its progeny accord the LGAL strong arguments in support of child-parent visits even while the parent is incarcerated.

b) Online Poll Questions/Responses/Discussions

1. Have you been involved in a Mason Appeal?

a. 64% responded online yes

2. What is the Ruling in In re Mason?

Two of the biggest responses:

a. Reasonable efforts responses

b. Incarcerated parties' ability to participate in hearings

3. Only the respondent incarcerated parent can make a Mason challenge: 91% false response

a. LGAL, other parents, prosecutors, minor child(ren) can make Mason challenges

4. DHHS has been trained on the new rule to send mail to MDOC facilities: 78% false response

MI PRISONS INSTITUTE HAS NEW REQUIREMENTS FOR LEGAL MAIL

a. There is a QR Code Process now. There is a non-attorney option when a person is signing up.

b. Prisons often ask the sender of the mail to confirm they sent the mail.

C. Moderator indicated she has only been allowed 5 minutes to speak with d. incarcerated client before or after the court hearing.

5. IS THERE AN ESTIMATE OF HOW MANY INCARCERATED INDIVIDUALS FACE NA PETITIONS?

a. Approx. 10,000 per year statewide

DISCUSSIONS:

- The QR code is for MDOC.
- You have to work with the court scheduling wise to be able to talk with your client in holding regarding service plan, pleas, etc..
- An attorney indicated that the MDOC would not let them speak with their client. A habeas petition was filed. The prison then brought the client down to speak with attorney.
- An Attorney indicated that in some conversations with clients, it was discovered that the client was incarcerated about 2 miles away from the case connected courthouse. Had the attorney not been able to eventually meet with the client, they also would have never known about relatives the client had for potential placement of his minor children

6. WHAT REASONABLE EFFORTS ARE YOU CURRENTLY SEEING being addressed FOR INCARCERATED PARENTS?

RESPONSES:

a. Attempts to contact.

b. Notification of what services are available in the facility.

c. If lucky, available workbook packets are being sent to the incarcerated parent for completion.

d. Educational opportunities in the prison/jail facility for incarcerated parents.

e. None. They might send some papers and tell parents to return what they have read.

f. Packets, video visits, meetings with case workers.

7. A 16-YEAR-OLD WAS ABLE TO DOWNLOAD AN APP USED BY THE MDOC TO SPEAK WITH THEIR INCARCERATED PARENTS. THE CHILDREN USED THEIR MYOI (MICHIGAN YOUTH OPPORTUNITY INITIATIVE) MONEY TO PAY FOR THE CALLS. SHOULD THE CASEWORKER DO ANYTHING? *16-year-old was able to talk to father for the first time every day for 30 minutes. Father found out teen was pregnant. Teen was using MYOI money to be able to conversate with the parent. Atty notified caseworker. The worker had no experience with this process.*

AUDIENCE RESPONSES:

a. The worker should use alternative funds so the youth will not have to use their MYOI money to communicate with parents.

b. It is not appropriate for the parents to communicate with their child through a child's JPAY account because this is expending the child's JPAY money.

CHILD SUPPORT

Regarding child support orders, courts must consider whether the client has the ability to pay while incarcerated. Child support must be zeroed out while defendant is in prison.

PRISON UPDATES/DISCUSSIONS

- PHONE COMMUNICATIONS: Some prisons allow inmates to text people. Some inmates have phone numbers in jail they can use to text their workers.

- EDUCATIONAL OPPORTUNITIES: Attorney have asked for their clients to be moved to different facilities to be able to participate in educational opportunities.

- REASONABLE EFFORTS: An audience member asked what the judges can do to help cases progress with clients being able to communicate with their worker or family while incarcerated.
  a. In the in re Barber Espinosa MCOA case. The COA panel was proactive in addressing reasonable efforts concerning incarcerated parents. The COA panel addressed whether efforts towards reasonable efforts were reached.

- APPEALS: An attorney in this session believed MAACS (Michigan Appellate Assigned System) attorneys are not very experienced in handling juvenile appeals, which is causing an issue with the due process rights of the parents.

- There are also funding issues with appointed attorneys. Some attorneys do a sufficient job on their briefs while accepting low pay so funding may not always be a quality control issue.

- Attorneys have taken notice that transcripts also have not been proper because many transcripts are wrong which then prompts a request for the video or audio hearing transcript to correct the record.

- Some attorneys are not requesting Extensions with the COA to file Brief on Appeals (BOA'S). They are just filing a 3-6 short brief.
- **No one has seen a Brief extension request being denied**

- Some attorneys do not even ask for an extension to file a BOA. In turn, they just do not file the BOA.

- Oral argument is often not requested unless the other party requests oral argument.

- The MCOA is extraordinarily generous in granting virtual oral argument. There was an audience comment that a judge (even if not endorsed) judiciary would encourage the attorneys to appear regardless.

- A judge in this session found that the COA panels usually have a lot of questions on cases, so it would helpful if the attorneys always appear for oral argument.

8. QUESTION: WOULD THE COURT OF APPEALS (MCOA) GRANT ORAL ARGUMENTS IF NOT EVEN ENDORSED.

a. If attorneys are late in requesting oral argument, it will be hard to grant a late oral argument

9. QUESTION: IS THERE A COURT RULE THAT CHANGES AND IMPROVES SOME OF THESE ISSUES SUCH AS HOW CAN WE ADDRESS MDOC COMMUNICATION ISSUES

a. An attorney suggested that a court rule be integrated to provide some oversight, rules, and direction towards the MDOC's procedures regarding incarcerated parents and communication issues
b. There was a suggestion that Bar Associations should consider getting involved in helping change the rules and procedures regarding this.

10. WHAT IS THE MOST APPROPRIATE REASONABLE EFFORT: CASEWORKER LEARNS INCARERATED PARENT IS ABLE TO HAVE IN PERSON VISITS. THE FACILITY IS 6 HOURS AWAY FROM WHERE THE 5- AND 12-YEAR-OLD KIDS ARE PLACED. THE COURT ORDERS WILL ALLOW SUPERVISED VISITS.

a. HIGHEST RESPONSE: The case worker should contact the facility to see if the incarcerated parent can have weekly video visits. RESPONSE FROM RESPONSE: This goes against the court order.
b. LESSER RESPONSE: The case worker should arrange to take the children themselves to the facility once a month.
c. ALMOST EQUAL RESPONSE: The case worker should ask a relative if they are willing to take the children to see the parent once a month.
d. LOWEST RANK RESPONSE: The case worker should ask the LGAL if they think the long-distance travel visits are in the child's best interest.

e. There was a suggestion that the parenting time section be open in SCAO court order form…instead of having a check box in that area.

f. Some attorneys believed IT WOULD be too restrictive if the court placed in their order that the child **must** be driven 6 plus hours to parenting time visits.

11. WHAT IS THE MOST APPROPRIATE REASONABLE EFFORT IN THE FOLLOWING SITUATION: INCARCERATED PARENT'S EARLY OUT DATE IS IN 6 MONTHS. PARENT IS GRANTED PAROLE BUT IS MOVED TO 3 FACILITIES TO COMPLETE A REQUIRED CLASS FOR RELEASE DURING THE NEXT REVIEW PERIOD.

a. HIGHEST RESPONSE: Case worker should still attempt to visit the specific facility the incarcerated parent is at.

IV. Plenary – Perspectives on Opinion Writing and Briefing

[TRANSCRIPT ATTACHED AT TAB E]

V. Plenary – Supreme Court Practice Tips

[TRANSCRIPT ATTACHED AT TAB F]

Tab A

MICHIGAN APPELLATE BENCH BAR CONFERENCE

PLENARY - COURT OF APPEALS PRACTICE AND PROCEDURES

The MICHIGAN APPELLATE BENCH BAR CONFERENCE,

Taken at 44045 Five Mile Road,

Plymouth, Michigan,

Commencing at 9:34 a.m.,

Thursday, May 15, 2025,

Before Earlene Poole-Frazier, CSR-2893.

Plymouth, Michigan
Thursday, May 15, 2025
9:34 a.m.

MS. WITTMANN: Good morning. My name is Beth Wittmann, and I am leading this panel here this morning, and I have a wonderful panel that is helping me today talk about the Internal Policies and Procedures of the Michigan Court of Appeals.

We have on our panel the Honorable Christopher Murray, who has been a judge on the Michigan Court of Appeals since 2002, and he served as Chief Judge from 2018 to 2021. We also have Jerry Zimmer, who has been the Chief Clerk of the Court of Appeals since 2013. We have Gary Chambon that is the District Clerk for the 4th District of the Court of Appeals. We have John Hiemstra, who is a Detroit District Commissioner, and he previously served as the Court of Appeals Senior Research Attorney. And we also have Tim Diemer, who is a partner at the appellate litigation firm of Jacobs and Diemer in downtown Detroit. And in his first job out of law school, Tim was on the prehearing commission on the Michigan Court of Appeals.

Then around the room as well we have Ann

Sherman and Ashley Chrysler. Ann Sherman is Solicitor General for the Michigan Department of Attorney General. Ashley is a partner at the law firm Warner, Norcross and Judd. They will be kind of walking around the room. So if anybody has any questions for the panel, write them down on a piece of paper that you have at your table, wave them up in the air, and they will come around and they will grab those and bring those up.

My name, again, is Beth Wittmann. I, as of yesterday, officially am a partner at the law firm of Greenbaum and Wittmann. And I'm also a board member for the MA, Michigan Appellate Bench Bar Conference Foundation.

So now that we have those introductions out of the way, we want to get to know a little bit about you. So we have our very first polling question. So get out your cell phones, get on those apps. You have to find the event. It's Plenary Session on the app. And there is a link to polling questions on the app. So look under my schedule, hopefully everybody can find it.

So the first polling question: Which option best describes your appellate practice? And then hit submit, and it should be pretty spontaneous. All

right. Good.

So it looks like we've got a lot of people that predominantly do appeals. So some of this that we're going to talk about may seem, you know, second nature maybe to some people in this room that predominantly do appellate law, but I always find that in these meetings, in these seminars, I always learn something, something new.

So my first topic that I would like to talk about is I had it titled: What do people do all day? So I just want to get kind of a sense of what you do, maybe not every day exactly, but you know like, Judge Murray, what do you do? Like what is the course of maybe for a week or per month I think may be a good way of doing it.

JUDGE MURRAY: On a daily basis, I think why did it take Mark Granzotto so long to make you a partner. Truthfully, though -- is this working audience?

AUDIENCE: No.

MS. WITTMANN: Pull it a bit closer.

JUDGE MURRAY: They probably did. Does that work?

AUDIENCE: No.

MS. WITTMANN: Tim's is working, if you want

to pass that over maybe.

JUDGE MURRAY: Is that better?

AUDIENCE: No.

MS. WITTMANN: Jerry's got one. We got this.

JUDGE MURRAY: So the question is what do we do on like a routine basis?

MS. WITTMANN: Exactly, yes.

JUDGE MURRAY: Well, I could try to be funny, but Judge Young and Judge Cameron are here, and I wait every day to hear their humor, and they are very funny people. But, no, on a daily basis it's kind of obvious. We prepare for case call. Usually I try to wrap up 99 percent of my cases after case call by Friday, after case call. And then next Monday I start up for the next month. And so it's just reading the reports, reading the briefs. I start with my cases usually. Not usually, always. I get through those, certainly, when I can.

Tuesdays are motion days, so any kind of administrative motions, you know, motion docket, applications, things like that, and reconsideration are all done on Tuesday. And the rest of the days are reading and writing and research. And that's why a lot of people think our jobs are not the most exciting

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thing, but that's it. Because that's what you have to do, because everybody knows that a court cannot fall behind, or else there's a big problem. So staying on top, and that means reading, writing, editing, and researching.

MS. WITTMANN: Okay. Jerry, what exactly -- what does the clerk -- as the Chief Clerk of the Court of Appeals, what do you do on a daily basis?

MR. ZIMMER: Well, like I would say that it's hard to say an average day. It kind of takes on a life of itself most days. But I think overall the idea is, you know, the clerk's office, I think our job is to manage the caseload, make sure that things are moving through the court. I often say, you know, it's like herding cattle. We are just pushing, you know, going back and forth behind the herd, pushing their cases forward. If one goes off in the wrong direction, you know that's a lot of times where emails will come to me, you know, we have this strange situation that might happen. Somebody wants an interpreter on a case call or things like that. So there's some of that. Most of that is handled on a daily basis by our district clerks and assistant clerks, commissioners.

So for the chief clerk job, I only see the

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upper layer maybe of that. You know, something that is that unusual that maybe they would contact me, and all that's through emails.

We have a lot of projects going on all the time. Our case management system, we're constantly trying to evolve that into new technologies, to be more paperless. I think some of you have seen that. You know, those changes that we've made, like the opinion release process that we introduced last fall, you know that took a couple of years to get that in place. Then there's a lot of meetings and things like that, trying to figure how to do it.

Then we have internal, you know, policies for the projects. You know, how to manage the case calls. As judge -- our chief judge already said, you know, we're looking at some changes to try and move the work around a little bit to be more productive. So I think that kind of covers it. You know, it's project oriented at the chief clerk level. But at the end of the day, the main thing for the clerk's office is to keep a focus on the cases and make sure that we move it.

MS. WITTMANN: Thank you. Gary, explain what then a district clerk would do that is different or maybe some overlap with the chief clerk.

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MR. CHAMBON: Well, I'm involved a lot with the docketing staff in our office, helping them with questions about how to docket certain pleadings, you know, when it's not entirely clear. A lot of the work involves monitoring management lists to make sure cases are moving through the court properly, and sometimes I catch mistakes and things that need to be corrected. I'm involved with jurisdictional review of new claims of appeal, and I do memos on certain types of motions.

MS. WITTMANN: What kind of motions do you do memos?

MR. CHAMBON: Mainly administrative motions.

MS. WITTMANN: Okay. And explain what those would be?

MR. CHAMBON: Like motions to extend time to file a brief.

MS. WITTMANN: Okay. And then, John, what does a district commissioner do?

MR. HIEMSTRA: So the commissioner's office, we're part of the research side, but we cover a lot of stuff. We're a little bit of a swiss army knife for the court. Mainly we've got applications, original actions, a couple other odds and ends, like motions, review emails, things like that. We'll get called in

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on a claim matter occasionally, if there's a motion someone may want some help with. We do the same kind of intake review that they do on the claims side, looking for defects jurisdictionally, that kind of thing. We also answer questions on the phone. We take calls from counsel about, you know, questions about court rules, where do I need to file or, you know, giving us alerts that an emergency is coming, things like that.

We answer questions from the judges. We're, obviously, writing reports, memos, orders. We might get called in on remands from the Supreme Court. We cover a lot of different things. So it's different every day. We kind of go in every day and don't know exactly what's going to happen, and we have to kind of roll with it. You may have a plan when you come in on Monday morning, and then by 2:00 you're, you know, 30 yards away from where you thought you were going to be.

MS. WITTMANN: Thank you. So next we're going to kind of go into tracking of an appeal. Let's start with an application for leave to appeal. What is essentially the chain of custody for an application for leave to appeal? Who receives it first, who works it up, what happens there?

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MR. HIEMSTRA: There's a few minor differences between the district offices. As you know, we're divided up into four districts. I work out of the Detroit office. Generally we have, you know, non-attorney staff who do the initial, you know, just opening the application, getting it docketed and give it a case number, you know, in our system. But after that, it's going to be referred to a commissioner. So we do review for defects, review for jurisdiction. We'll, you know, direct defect letters being sent out, that sort of thing, you know, we spot. If we don't have jurisdiction, we'll submit those off to be dismissed.

If all things go according to plan, from there we pretty much can ignore it for, you know, three or four, five months, whatever it is. But a lot of times questions come up along the way, you know, about filing an answer, transcripts, all these different problems, so we may have to be on the phone to answer those kinds of questions.

We keep a number of lists. We have a priority list. We have a regular pending list and those are what we work off. We have two commissioners I think in every office right now. And we just take a look at the lists. If there's a priority that's

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ready, we grab that. If not, we go to the other list, grab that. And it's pretty much a first come first serve, you know, just grab what we can, get them on the way. And then on Tuesdays we do our submissions and send those off to the panel.

MS. WITTMANN: So one of the things that I've learned recently is that applications are no longer decided by the district that they're filed in. Is that correct?

MR. HIEMSTRA: Yes and no. I mean what happened was, I think, back, it changed over a year or so, I forget. But it used to be that, you know, applications, so like, for example, Detroit District we had Wayne County, Monroe County, Lenawee County, each district who had counties assigned to it. And it used be that just Detroit judges would sit on motion panels. And so with all the things, you know, that I work on would go to the panel of Detroit judges.

Now what's happen is the panels are randomly drawn across the district. So we may have judges from Detroit or Lansing or whatever, you know, it's completely mixed up. Other than that, nothing's necessarily changed. I'm still working on applications that are coming out of the same three counties, and the districts, you know, the

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commissioners are still working on the same counties, it's just that the panels are mixed up now.

MR. ZIMMER: I think that, you know, this is part of the evolution from paper, you know we're able to do that now. 20 years ago, everything was in paper, and we had to move that application, which might be this thick and long and several others to that judge. And the way to do that was to carry it to their office from the clerk's office, which was located right next door. And so, you know, the fact that we're paperless now, the motion dockets are delivered electronically to the judges. It allows us to deliver a Detroit motion docket to a Grand Rapids judge, you know, at the same time that the Detroit judge is getting it. And that began in the beginning of January 2024. So we've been doing it a little over a year now.

MS. WITTMANN: Okay. And how are the panels then assigned for the motion calls?

MR. ZIMMER: At the end of each year, so around October this coming year we will set the panels for next year for the motion docket, and that's random. Our case management system has built into it an algorithm that kind of spins the wheel and assigns three judges to each of the four district panels for

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every month of the year essentially randomly.

MS. WITTMANN: Okay. And that's separate from the case call as well?

MR. ZIMMER: I'm sorry?

MS. WITTMANN: Is it separate from the case call?

MR. ZIMMER: And we do a separate calendar for the case call that does a similar sort of thing.

MS. WHITTMANN: Okay. Judge Murray, what is your assignment application, what is your process for deciding that?

JUDGE MURRAY: Well, the process is, like Jerry said, it's all electronic, you know. Although I have -- you know we get -- it varies by district, anywhere from 10 to 20 I would say, roughly. And I'd say the majority of them have some type of report. If it's from the commissioners, it's more detailed. And so I, you know, just go through them and, you know, read the report. Just kind of like case law, you read the report, read the application. If you need to check the record, it's right on there, for the most part, and to the extent it's provided. And it's all, you know, email voting. And so we explain what our vote is, and if there's an explanation as to why we're voting a particular way, if there's some issue that

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needs attention, it should be granted or what have you. And, you know, it used to be -- and that's for a regular motion.

If you get an emergency, obviously, it's a quicker turnaround and you may not have a memo on that. And in the old days, you know, I could walk down to the other judge's office and say, hey, what do you think? Now, because we all are split up, it's more emails and maybe a phone call.

MS. WITTMANN: Okay.

JUDGE MURRAY: The process is pretty straightforward.

MS. WITTMANN: Is there anything difference at all with respect to family law, civil law, criminal law?

JUDGE MURRAY: Not the process.

MS. WITTMANN: Okay.

JUDGE MURRAY: Obviously, in how you view the application case is, but not the process.

MS. WITTMANN: Okay. Now, you mentioned emergency applications for leave to appeal. Is the process different for emergencies?

JUDGE MURRAY: It's shortened. That's all I can say. And then you get less material. Like I said, it depends on the turnaround. If it's an

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election case and all that, something we have to turn around the next day. Sometimes if it's a motion for expedited appeal, and you get it on a motion docket, then you have to decide the appeal and opinion, so that's a different process but kind of the way you go about deciding it.

MS. WITTMANN: Okay. And, Tim, what are best practices for emergency applications for need to appeal, from a practitioner's standpoint?

MR. DIEMER: I'm glad you asked that question. And I'm going to do that.

MS. WITTMANN: I was going to ask you that.

MR. DIEMER: When we have an emergency appeal, first thing we do is call the commissioner's office. Some leave a voicemail. Sometimes you get a human on the phone. We explain what the emergency is, give the lower court docket number, the county it's pending, the rest of it. And you give the Court of Appeals a heads up that there's an emergency coming. And the commissioners will typically appreciate getting a heads up. They can get the case set up on their own internally so they know what's coming.

One of the most important things would be to let the commissioner know what the emergency is. What's the doomsday scenario the appellant's trying to

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avoid. If you represent the defendant in a civil case, you're trying to avoid trial, you give the commissioner the trial date and you request a decision before trial's going forward. Or if it's a motion to compel granted and your client doesn't want to turn over a sensitive document that's privileged or proprietary, you give the commissioner a heads up, I have to turn this document over by June 20th, and you request a decision by June 19th.

Once you give that information to the commissioner, the next thing I have been doing is getting to work right away. An application for a leave to appeal is not a claim to appeal, it's not a form, it's a full-fledged brief. If it's an emergency, you've got to do the application. You've got to do a motion for immediate consideration. There's all sorts of collateral motions that go along with the appeal. And even though you might have 21 days, under the court rules, to get your application on file, the sooner the better. Especially if you're asking the Court of Appeals to act expeditiously. Move heaven and earth to get your decision by this day, don't lollygag, wait until the last minute and then file on day 21. It's important to show the court that you're acting with speed and effort to get to

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that to them as soon as you can.

So call the commissioner, get to work right away. And one other practical tip is that the application will be decided at the same time in the same order by the same panel as the motion for immediate consideration, the motion to stay, the motion that would transfer requirement and the rest of it all gets decided at the same time. You can't get a panel to stay a pending application for appeal, it's all going to be decided at the same time.

One last thing to be bring up. Jerry brought up paper filing days. So those who practiced before e-filing, an emergency appeal would take over the entire office. Nowadays with e-filing, the e-file gets immediate personal service at the time it was filed. Back in the good old days, sometimes we'd have five of us driving all over the state to hand-deliver paper copies. One person driving to Southfield, one person to Traverse City, one to Grand Rapids, all over the state just to get this thing on file. So if you want expedited consideration, you'd have personal service. It's so much easier now with e-filing.

MS. WITTMANN: Yes. I remember I forgot about the $200 for a motion for immediate consideration, and I was running down to the pay

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machine in the downstairs at the Court of Appeals getting an extra hundred dollars so we can get it processed. So, yes, it was fun times.

Okay. So this then I think can -- oh, from the clerk's office, I'm sorry. For emergency applications for leave to appeal, what do you do? Is it all hands on deck. I know you used have to, I think, chase down judges that would be available sometimes deciding.

MR. HIEMSTRA: Yeah, I mean so on a motion to appeal is assigned at the end of the month. If an emergency comes in during their month, that's their problem, basically. So it's not so much we have to chase people down so much. We know who we're after, they know they're on. So first thing we do is, you know, send an email, heads up, this is coming. And that's why, Tim was mentioning the phone calls to give us a heads up, they are very much appreciated.

One thing, I don't know if you would know this, our system, like when a filing comes in, it's not like an alert that automatically pops up and says, hey, you got an emergency. We have to be like refreshing our system to see that it's there, to see that it's got a priority flag. If you forget to file a motion for IC, it's not going to show up as a

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priority in our system, se we may not even notice it. So please make sure you file that motion. But if you give us that phone call, then we can alert everybody, we're all on the lookout, we're checking to see what's coming. So those phone calls are really important.

In our system now, we can do voicemails and things. I understand you may not get a phone call back. It doesn't mean we don't really, really appreciate it, it's just that we're, you know, checking to see if this thing's coming. So, please, phone calls are great.

Other than that, you know, like Tim was mentioning, you know, get them to us as soon as you can, because no one likes to see an emergency where the appellant's taking all 21 days to file it, and then saying I need action in 21 hours. It's not fair to us, it's not fair to our panels, it's not fair to the appellees, so please try to get those in. We're all human, you know, and we need time to be able to process these things, too.

Other than that, you know, as far as processing them, yeah, it's kind of all hands on deck. We usually have -- some of the offices work a little bit differently. Like in Detroit, we've got two commissioners and we operate on, you know, we

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alternate weeks. So this is not my week on emergency duty, fortunately, so I can be here. But, you know, we just switch it up every week. You know, like Commissioner Jeff, you know, if he were to get emailed three a day or something, then, sure, I'm going to jump in and grab one and help him out. Other than that, it's, you know -- it gets it to a panel as quick as you can and, you know, answer any questions they have, helping out with orders, and, you know, trying to make sure that we get things done on time and move them along the away.

MS. WITTMANN: Great. Thank you.

MR. CHAMBON: Is this working?

MS. WITTMANN: No, try Tim's.

MR. CHAMBON: When there's a motion for reconsideration is filed, besides filing it, you want to be sure that in the e-filing system you select that IC motion option, because otherwise it won't get flagged by the way it comes to us as a court priority case with an IC motion. And less importantly, but still important, that makes sure the correct $200 motion fee gets charged instead of just the 100.

MS. WITTMANN: Yes, I'm aware. Okay. So this actually leads us to our next polling question. So everybody get your phones out. Second polling

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question: Have you ever called a commissioner regarding an appeal. The first answer is yes, I am on a first-name basis with the commissioners, and I know there are people in this room that answered yes to that. But infrequently no, and no, I didn't know I could speak with a commissioner.

Okay. So that's interesting, a lot of people didn't know that they were allowed to talk to you. So, hopefully, you will now get more and more questions. All of us crazy people will be calling you all the time. Okay. But, John, I think you and Gary kind of talked about this. What other types of calls do you get? I know you talked about for emergency appeals. But what other questions do you field or can you field?

MR. HIEMSTRA: Well, as far as what we can field, I mean, you know, it's far more easier to say what we can't. We can't give anyone legal advise. I think everyone knows that. We can't tell you whether you should appeal, what kind of appeal you should file. We can't tell you, you know, what motion is necessary. Like, you know, do you think I should file this motion? It's up to you. You're the practitioner.

Now we can answer questions about the court

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rules, and we answer those all the time. Things like, you know, what are the requirements for an application. What documents do I have to file. You know, what do I need to do. Or, you know, this one's got a little weird situation, say with a consolidation in Wayne County, can you help me figure out what I need to file. You know, how I should caption the application, you know, what's going on. What am I going to owe in fees? I've got multiple orders, do I owe multiple fees? Those kind of questions. It's those kind of procedural things related to court rules that we can answer for you.

MS. WITTMANN: Gary?

MR. CHAMBON: It seems like a lot of the calls -- well, a lot of the calls are handled by the excellent docketing staff in our office. But if they're more involved procedural questions, they're often from attorneys who are not specialized in appellate practice. So it might be directing them to 7209 on motions for stay just to details for what they need to do procedurally because they're just not familiar with it.

MS. WITTMANN: Interesting. Okay. And, Tim, any other experiences that you have, other than, you know, obviously emergency applications for leave

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to appeal.

MR. DIEMER: Absolutely. And I would say that the poll results are a sign that this is a timely topic that not everybody knows. It's okay to call the commissioner. And some trial courts might treat you like the enemy, but the Court of Appeals commissioners office is very friendly, very helpful. And then, yeah, speaking of emergencies and the rest of it, one benefit of letting the commissioners know is that oftentimes if it's an emergency appeal, they will give the parties, it's kind of a great area, a different briefing schedule. The court rules might allow 21 days or some other timeline. But if it's truly an emergency, giving the Court of Appeals a heads up gives them an opportunity to reach out to all the parties, set a briefing schedule. And then if you're the appellant, give you some time to maybe get a reply brief in at the last minute.

We always call the commissioner. We've got cell phone numbers of some commissioners who are happy to help out in emergency situations. They're happy to give them out. And I've always found the court to be very user-friendly and helpful when making a phone call.

MS. WITTMANN: I agree. Okay. So we're

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going to switch over and talk about tracking a claim of appeal as opposed to an application for leave to appeal. So, obviously, we're not talking about jurisdictional review. I know commissioners then would perform that. What happens at that point? What happens if you determine that there is no -- your jurisdiction does not exist in the Court of Appeals at that time?

MR. CHAMBON: I think your question's about a claim of appeal?

MS. WITTMANN: Yes.

MR. CHAMBON: It's initially -- well, after it's added by a docketer, it's initially reviewed by a staff attorney, a district clerk, or assistant clerk, and for both jurisdictional concerns and filing defects. And if it appears there's a lack of jurisdiction, a memo will be done and it will be referred to a judge of the court for possible dismissal.

MS. WITTMANN: Okay. Is it a panel of the court or is it a single judge?

MR. CHAMBON: It's a single judge.

MS. WITTMANN: Single judge. If you challenge that determination, does that go to the panel or does that still stay with a single judge?

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MR. CHAMBON: If a dismissal is entered that states no grounds, under the court rule it goes to a three-judge panel, and a motion for reconsideration is filed. And that's also exempt from a motion fee.

MS. WITTMANN: Okay. Interesting. I can save my hundred dollars.

MR. CHAMBON: There's a specific option for that in the e-filing system.

MS. WITTMANN: Okay. Very good. I think it's important to note, too that, and I think we all know this, but just because a circuit court order says that it's a final order, it doesn't mean that it's a final order. And simply because it doesn't indicate that it's a final order, it's still going to be a final order. So, you know, that's obviously a difficulty I think that we as practitioners have.

So let's see, docketing statements. We get this question all the time. Why do you need docketing statements? What is the purpose of a docketing statement?

MR. CHAMBON: Well, I'm not sure if I have the right microphone.

MS. WITTMANN: I think you're okay.

MR. CHAMBON: Okay. They're used partly to screen cases for the settlement program, and there are

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questions in there about related appeals. Those can be helpful in appeals being consolidated under the court's own initiative.

MS. WITTMANN: Okay. Now, a lot of issues with the record on appeals. Sometimes it lakes a long time to actually compile the record on appeal. But who is responsible in the court for making sure that a record is in fact available for the court?

MR. CHAMBON: Well, each district has a records clerk who -- many of the records now are received in electronic form from the trial court, and then that's essentially just added to our case management system and it will be available for the judges. And most records now that come in paper form are scanned by the records clerk so that they are available to the judges electronically.

MS. WITTMANN: Okay. And then where does that go then? What is the process then? You get the record, you have the -- does that happen before the briefs are filed, after the briefs are filed?

MR. CHAMBON: No, not typically. Typically, either shortly after the appellee's brief is filed or after the time for a timely filing has run out, we send a record request to the lower court.

MS. WITTMANN: Okay. So when you get the

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record and the briefing then, that would then go to prehearing or, I'm sorry, to research and hearing.

MR. CHAMBON: Well, research. As a general rule.

MS. WITTMANN: Okay.

MR. CHAMBON: I feel like I should add, because this happens quite a bit in claim of appeal cases, you know, apart from the need to file a transcript with a motion for stay or for some specific reason, you do not directly file copies of transcripts with our court because they should be in the lower court record that will be forwarded at the appropriate time.

MS. WITTMANN: Okay.

MR. HIEMSTRA: And if I could add one point on applications, is they are completely different on this aspect. If you're filing applications, we do not get the record at all from the circuit court. So we're not going to get transcripts. We're not going to get anything. So anything you want us to see on your application, please file those in your appendix of exhibits. And also keep in mind that once the transcripts are ready, the appellant is responsible for filing those with us. The court reporters may not. Sometimes the court reporters file them on their

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own with us, but that's pretty rare. So it's the appellant who needs to file that transcript with us on application matters. Otherwise, we're not going to get it and you're going to be calling me and trying to -- that's one of the other phone calls we get sometimes, is talking to people to file transcripts with us. But, you know, just keep that in mind, we do not get the record at all on application matters, not until they're granted.

MS. WITTMANN: Yeah, that's important. When then -- Judge Murray, when would you actually get everything? Is it after you've been -- how long after you've been assigned the case will you get everything, briefs, the record, everything else?

JUDGE MURRAY: I don't know. I don't know. Every one is assigned to me.

MS. WITTMANN: Okay.

JUDGE MURRAY: But typically we get them, I'd say we get most of the briefs and the records and everything four weeks before our case call. Isn't it, roughly?

MR. ZIMMER: Yeah, it's about five weeks. I don't know if this is working or it's on. So about five weeks ahead of the case call. I think a week ago we released the July case call.

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MS. WITTMANN: June.

MR. ZIMMER: June. Sorry. And it's about five weeks ahead of the first date of the case call we will assign the cases to the judge. That usually happens on a Wednesday about five weeks ahead. So on Wednesday morning, an email would go to all the judges, you know, your cases are now available on our case management system. His office would open that up, you know, for his panel and find all the cases and the briefs are there, the record's there, transcripts, et cetera, so they can start pulling together their case call materials for the next month.

The next day -- we give it 24 hours. The next day we send out the notices to you that say, you know, your case is on call. We build in that 24 hours just in case a judge recognizes a case they should be disqualified on, we have a minute to switch it to a different panel or pull it off or what have you. So that's how it works.

The question is, you know, how soon does he get it? He gets it immediately. As soon as we assign it, he gets it and he has all the materials there by virtue of our case management system.

MS. WITTMANN: And that's true for all of the judges that are on the panel?

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MR. ZIMMER: Yeah, all the judges on all the panels. They all -- it's one email. Once accept it, her job is to set up that monthly case call. We have a case call coordinator that does all the work, really. But through our research director, Katie and I kind of consult a week or two before that to work on problems cases that we want to get on the call that are ready, but they may have some issues. And then in those days before that Wednesday I mentioned, the case call coordinators is putting that together. It's all essentially done through an algorithm in our case management system that places the cases on the calendar that we created a year ago. And then, again, on Wednesday morning that case call coordinator sends out an email to all the judges the case call materials for June are now ready, and you can find them in the case management system.

MS. WITTMANN: Okay. And, Judge Murray, so obviously the practitioners are now required to file an appendix with their briefs. Have you found that the appendix has made the record on appeal not as important, or, you know, has it changed at all how you view the record?

JUDGE MURRAY: Not really, because -- and I think I emailed Jerry about this a couple weeks ago.

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A lot of the appendix don't have everything they're supposed to have, and so, you know, so the record is still -- essentially they're electronic, which like I said a lot of them are, it's so easy to click on the link and find what you're looking for. And I think we always envision that the appendix is just a convenience thing for the judges. So I'll go to the appendix looking for the opinion on appeal, or whatever it is, but if it's not there, you got to have the record there anyway.

So it helps for sure to have the appendix, assuming they have everything in they're supposed to. But it's still you got to have a record to double-check or find something that might not be there.

MS. WITTMANN: All right. Very good. So anything that anybody else wanted to add about the record on appeal? When there's difficulties, like problems getting transcripts, court reporters that are not timely, who handles those issues? I think everybody is interested in this answer.

MR. ZIMMER: I mean, the reporter issue, reporters generally are statewide, and I think nationwide, since COVID, like everything else, you know, they had a shortage of reporters. The reporters

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in Michigan for years did not get a raise in their page rate, since then, I don't know what it was, since the early '80s, they hadn't had a page rate. They just got legislature to increase their page rate. Hopefully, that will help in some sense to bring more reporters in to do the work. You know, that's a constant issue for us in the clerk's office.

When I mentioned about trying to herd the cases along, one of the main things we're doing in the first few months is trying to make sure that transcripts get filed, and that's a laborious process in a lot of cases, because the reporters want extensions or they don't response, you know, to their 91-day deadline, they don't file, and we have to follow-up, the attorneys have to follow-up. That's been a nagging issue for at least ten years. But especially the past five years after COVID.

You know, we have -- so when we have court reporter issues, show causes, motions to extend time, each district has a judge or a panel of judges that handle the motions that come in on those things. So I'm not sure if that fully answers your question, but that's how it works.

MS. WITTMANN: I think so. Okay. So let's talk a little bit about motions. So I think there's a

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distinction that we made here between, you know, like administrative motions and substantive motions. What is the chain of -- what's the right term here -- command, there we go, how does that come through? How are substantive motions processed in the Court of Appeals?

MR. ZIMMER: We have -- I'll big picture it.

MS. WITTMANN: Sure.

MR. ZIMMER: We have several motion dockets that exist each month. The main one is the regular motion docket we call it, that's the monthly ones we talked about. We set the calender for each year as the three-judge panel for each district. There's also an administrative motion docket. There's one judge, each district has a single judge who handles that. Judge Murray in Detroit, for example. And Judge Gadola in Lansing. And then we have a court reporter motion docket that handles the kind of things we were just talking about.

The quarterly panel we have handles reconsiderations of dismissals that we do for jurisdiction. And that sits for a full three months. I'll let Gary, you can talk about what happens with the substantive motions, which I would consider the regular docket motions and applications that come

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through.

MR. CHAMBON: Well, in a claim of appeal case, or a case after an application's been granted, a substantive motion, like a motion for stay or to dismiss would be submitted to a three-judge panel. The administrative motions are submitted to the local administrative judge who would decide them alone.

MS. WITTMANN: Do the -- oh, sorry, please.

MR. CHAMBON: Another exception could be if an administrative motion was linked with a substantive motion that came in at the same time, that might get sent to, you know, a three-judge panel.

MS. WITTMANN: Do substantive motions get reports. Like a motion to dismiss, a motion for preemptory reversal, things like that.

MR. CHAMBON: It depends. I mean some do and some don't.

MS. WITTMANN: Okay. Anything that guides that as to why some of them do and some of them don't? Is it a timing issue?

MR. CHAMBON: No, it's the nature of the motion.

MS. WITTMANN: Okay.

MR. CHAMBON: Like motions for preemptory reverse and motions to affirm just goes to the panel.

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MR. ZIMMER: I mean, our motions for remand are typically criminal. They get memos, motions to dismiss because they're often about jurisdiction. Those get a memo from someone like Gary, which are district clerks or assistant clerks. The motions for PR and for a firm, they're very rare, but when they do come in, we give them to the judges and they can ask for a memo if they want one. All the administrative motions, they generally get a very short memo with a proposed order, because they're run of the mill things, should we extend time for the brief, strike the brief, things like that. But that would be kind of a thumbnail view of what that looks like.

MS. WITTMANN: Okay. So we talked a little bit. Next thing that I have is the assignment of the case. So Judge Murray, you now have the case assigned to you about five weeks, it sounds, before oral argument. So what do you do at that point? Would you just start reviewing? Well, how many cases do you get per month, generally?

JUDGE MURRAY: It kind of varies. I'd say a low -- although it was more last year I think. We have a low sometimes 17 or 18. And then, of course, it depends if you have a Court of Claims judge on your panel, because they get a little reduction. So the

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low of 17 or 18, and the high of, I don't know, 23 or 24 would be my guess. And I think we're all pretty much the same. I think we all, for the most part, wait to jump into the next month until we're done with the last month. And so that gives you, depending on your turnarounds, if it's the shortest, it's usually three weeks, and the longest is maybe four, four and have, if you're lucky. And, you know, I'd say I guess all but three, well now six or something, come with a report from research, and the other ones you get a bench memo of some sort from the judges who have the no report cases. And, you know, you just dig into it, you know.

Obviously, we all deal with our cases first. And if it's appropriate we can circulate them to the other panel members ahead of time so they know what we're thinking. So it's a very, it's a very -- I mean, it's funny when I interview like intern people for internships and stuff, I tell them it's such an easy process that we have. It's not complicated. We get the stuff that we can consider, you read it, you digest it as best you can. And you spend more time on some and less time on others and you get better at that with experience and that's what you do.

MS. WITTMANN: So how is it decided who is

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going to offer an opinion? Is that assigned at the same time that cases are assigned to you?

JUDGE MURRAY: The computer tells us whose case it is, yes.

MS. WITTMANN: Is there any wiggle room on that? Like if you receive one, and you're like, you know what, this is really interesting, I want to do this one, can you swap them out?

JUDGE MURRAY: I mean I suppose you could. I don't remember it ever happening. Sometimes we'll obviously rely on like McDonald, or the judge, and he was a probate expert. We'd certainly say, well, you know, what do you think of this one, if he's not on the panel and it's not assigned to him, and we'd really look for his input. But, you know, the problem with that kind of thing is that we really have to process these things. And even though the number of cases that we have are down compared to when I started, you know, the briefs seem to be longer, more issues are raised, and you've got, like I said before, you've got to stay ahead of the game. You know, if you get behind five or six cases and you've got to move to your next month, you're going to be in trouble. Your staff's going to be angry and it's not going to be pretty.

So you can't really just say, well, you know, I'd rather do this evidence case rather than this one. Because then you've got to transfer it and it's got to be an email. So practically speaking, it's kind of hard to do.

MR. ZIMMER: I'll just add that, you know, when we assign the cases each month, part of that program assigns an author to each of the cases that are assigned to that panel. So if there's 21 cases, each judge would get seven cases essentially to author. And so our system is set up to keep that judge as the author of that. So to change it a little bit, we'd have to go back in and swap those out.

It never happens. You know, it could happen I suppose. But it's all -- and we try to -- one of the things we're trying to do when we assign the cases is to equalize the amount of work for each judge. So if you each have seven cases, they kind of all should add up to -- we attach points to each case before we put them into the system to say how difficult we think that case would be. So each judge gets an equal number of points each month, and so that's kind of getting into the weeds of how the system works to try to, you know, assign cases to the judges to be the author.

JUDGE MURRAY: The only time it really changes is, if the person assigned is the author and the other two judges don't agree, so then they've got to figure out who's going to write the new majority.

MS. WITTMANN: And you write a consent.

JUDGE MURRAY: But that's not based on your preference just because of the circumstance.

MS. WITTMANN: Okay. Interesting. Tim, what process do you follow when you receive notice of oral argument as a practitioner?

MR. DIEMER: Sometimes it depends on the panel I draw. First thing I do is say a prayer. Kidding aside, of course. No, the first thing I do is I put that date in the calendar and block off the entire date. Because that date is set in stone. It's not going to be moved. Sometimes there's agreement among the attorneys to go from the 11:00 call to the 10:00 o'clock, or from the Tuesday to the Wednesday. But that date is set in stone. You're not going to get a new panel or anything like that. So I block off that entire day.

Second, the notice will tell you when your motions are due, if you have any motions affecting the panel. I think I've filed one motion in my entire career. Because again, the date's set in stone, and

there's really not much to do at that point. So I still will put that -- I don't think that's on anyway -- the motion date. There we go. Put the motion date in the calendar just in case there is a motion.

The next thing I do is update legal research. The court rules allow from the filing of a reply brief to oral argument to file a one-page statement of supplemental authority. And sometimes the case will sit in the warehouse for six, eight, nine months from the last brief to oral argument, and a lot of times there will be authorities that are issued. And the court will only accept published authority. So if you've got a great unpublished case, it's not going to be much good. You can't file unpublished cases, supplemental authority.

You can go out-of state, though. So sometimes you've got an issue that's been addressed by the Indiana Supreme Court, for example, something like that. That's still published authority. That can be a supplemental authority you can provide to the court. And then prepare for oral argument. Reread the trial transcript. If you make a record representation of oral argument, you better be able to back it up.

Again, like I said, update your research,

prepare an oral argument outline. That's not just reading your briefs. Try to give the panel something different to think, they will have read the briefs ahead of time. That's typically what I will do when I'm given a notice of case call assignment.

I do have one question for the panel on that note. I've noticed, maybe it's coincidence, it seems like getting arguments back to back, same panel, used to be made once a month, and now I've two in one month, it seems to be assigned to the same panel back to back. I don't know if that's just a coincidence that I'm experiencing, or that's kind of a new policy within the court try to save people from making multiple trips to the courthouse in one month.

MR. ZIMMER: I guess I'm not sure. If you could explain that again. There's been no change, I'll start with that.

MR. DIEMER: Okay.

MR. ZIMMER: I don't know what particular situation you may be talking about. But we haven't changed anything we do as far as trying to couple cases together, things like that. We do often, we'll notice that the case call, typically we'll put the criminal cases first, because they're appointed counsel mostly and they're prosecutors, you know, and

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often they will have two or three cases, some of those attorneys, and so, you know, it's getting done in the morning. A lot of them are shorter arguments, maybe long than big civil cases, so that keeps them from sitting through that on the government dime, what have you.

Beyond that, though, we don't really try to put cases together. What other situations you were describing.

MS. WITTMANN: So, Judge Murray, with respect to motion practice, before the panel, I think generally most things would be -- typical motions I see would be like a motion to adjourn off of that case call on a motion for oral argument. So that means they would be decided by a panel. Do those have to be unanimous?

JUDGE MURRAY: No.

MS. WITTMANN: No. Okay. So it might get denied in oral argument it's unanimous they don't want to hear from me.

JUDGE MURRAY: It seems like we're nicer now than we used to be. It seems like the backdrop default is ten minutes, and, you know, so.

MS. WITTMANN: Okay. And what --

JUDGE MURRAY: The only thing where there's

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a question about division is the request for remote argument, right.

MS. WITTMANN: Okay.

JUDGE MURRAY: And that's, if one person says yes, I think I got that right, it's changed. If one person says let them do it remote, then that's it.

MS. WITTMANN: Okay. That's interesting. And, obviously, there's the policy that if you can send -- if you do send in a letter indicating that you're on vacation, you're out of the office, you're not available for certain dates, that will be honored by the court. That's, you know, a situation where I've seen a motion to adjourn that has been granted because that letter has been sent. What is the best practice? For a practitioner, when is the best time to send that letter in?

MR. ZIMMER: So in our case management system, when we have the briefs and we have the record, the case is essentially ready to go to research. But at that point, there's an automated notice that goes out to you that says your case is ready and it will be on for call. And I think that notice asks also if you have any conflict dates.

So from the time you get that notice from us it may be four, five, six months until your case is

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actually on call. At that point, when you get that notice from us, I think the good thing to do is, if you have a vacation coming up or a spring break or something that's four or five months out, you should let us know that. And what happens if you let us know and you file a letter that let us know you'll be gone for the first three weeks or more and what have you, we, in our case management system, go to your attorney record in our case management system and put down that you're unavailable for those first two weeks of March or what have you. And so then when we spin the dial for case call, that case will not come up because it shows a conflict for you for that month.

So if something comes up and, you know, after the time you get that notice, you know, a trial or what have you, you should then update what you've given us maybe before, or if something new happens, you know, you would want to let us know. I've told you before, about five weeks ahead of the case call we will assign the cases. And about a week before that we started working on that. You know what, oftentimes we'll get a conflict notice that says I can't sit in June or I can't come in June. Well, we already have assigned your case. You don't know it yet, but it's still a few days before we're going to send you that

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notice, but we've already worked you into the schedule.

Sometimes if it's soon enough, we'll pull that case off. Other times in some rare cases, it doesn't happen very often, but you will get, you know, a case call notice for a date if you gave us conflict. It's often because you gave it to us very late in the game, and we've already kind of worked that case in. I think best practice would be to just, you know, once a month or whatever look at your cases. If you've got notice on them, you should update any conflicts you have coming up.

MS. WITTMANN: Okay.

MR. ZIMMER: I will also say that IOPs, internal operating procedures say that we will not honor conflicts that cover two consecutive months. So if you give us something for March and then you also give us something for all the dates in April, if you can't put your case on call, either of those months, if the case is ready to go for April, we will let it go. And usually in that case I will send you something that says, you know, me or somebody else will send you something that says, we know you marked out this date, but that covers two consecutive months and we're not going to honor it, please make other

arrangements.

MR. CHAMBON: I just wanted to add a little thing. If you have multiple cases in the court, you can file that conflict notice in just one of them, because the dates are inputted in relation to your P number, so that might make it a little easier if you have a large number of cases.

MR. DIEMER: Will that cover the entire firm, or does each attorney need to file their own notice?

MR. CHAMBON: It's attorney specific, so there needs to be one for each attorney.

MR. DIEMER: So let's say three attorneys from the firm who files an appearance in the case, the one P number is not enough, all three should be submitting a vacation letter.

MR. ZIMMER: No, it will be that -- the system will pick up either one of you who has a conflict notice for that month. And that happens often. You know, we'll have three attorneys for the appellant on one case, and we'll see one of them, maybe somebody we know, that person's really not going to be the one to argue, they didn't file that brief or whatever. We will sometimes force that one on to the call. And typically if that happens, it doesn't

happen very often, but I would contact everybody, we know that you filed a conflict notice, but we're going to put it on call, and please make other arrangements. And typically that will be one of those other two attorneys can cover this, please.

MS. WITTMANN: Okay. Interesting. We have a few more minutes here. Decisions of the court. Now, Judge Murray, following oral argument, what is that process then for issuing those decisions by the panels?

JUDGE MURRAY: Issuing them?

MS. WITTMANN: Yeah, or deciding them.

JUDGE MURRAY: Like I said, I would say 80 to 90 percent have opinions that are pre-circulated, right. So we sit down, we vote on them. If changes need to be made, if people, you know, don't agree, we discuss the cases. And if they agree with what you've sent around, then, you know, I give them to my secretary, and she inputs it with the votes, and I think it gets released maybe the next day or so. Unless it's published, it might be a little bit of a delay.

MS. WITTMANN: That was my question, is there a distinction between when it's published or not published?

JUDGE MURRAY: There's timing, a separate review before it goes out.

MR. ZIMMER: Yeah, that review takes just a few minutes. Gary is one of the people that does that checking for conflicts on a published opinion. I think you're familiar, in the past eight months or whatever we've changed our opinion release process. It's no longer once a week, it's every day now. So what our opinion clerk is looking at is just a few of all the opinions that have been filed by the different judges.

So as they come in, they move their way up to the top and she just works from the top down. In a published case, as soon as that's filed, an email goes to Gary and another attorney for one of them to check that case. So by the time it moves up to the top, there's usually a checkmark by it that it has been reviewed, so it doesn't really show down the process at all.

I think nowadays, from the time the judge files the opinion with the opinion clerk, the time it goes out is 24 hours or less most of the time.

JUDGE MURRAY: And if it doesn't get assigned off at case call, we all have an agreement, I don't think it's in our bench rules or whatever, but

if you're working the next week on your next month's call and somebody then circulates a revised opinion or new one because they didn't pre-circulate it, our agreement is you drop everything and you pick up that because you want to get it done for the parties and, you know, let them move on to the Supreme Court or wherever they're going. So that's another par for our little process.

MS. WITTMANN: Okay. And what about like a motion to publish, it's not a motion --

JUDGE MURRAY: Request.

MS. WITTMANN: -- request to publish?

JUDGE MURRAY: It's got to be unanimous after. And I don't think they're granted very often, once in a while. But usually, you know, the winning party says I want to publish. Well, okay. But sometimes they bring up a good point, you know, it hasn't been decided in 20 years or something like that.

MS. WITTMANN: Okay. And then this leads us back to our very last polling question. So everybody please get out your cell phones. The last polling question has to do with the court's IOPs. So how often do you refer to the court's internal operating procedures, frequently, sometimes, never? What are

IOPS? Okay. See, this is wonderful. So now we're learning. We have internal operating procedures that are available on the court's website.

Jerry, could you maybe indicate what the IOPs indicate.

MR. ZIMMER: Yeah, our internal operating procedures, they kind of flush out the court rules in the sense of, you know, kind of informing you how the court will actually implement the court rules in a lot of cases, you know. And that was put together, the first iteration of that was 1998, a group of practitioners and court staff and judges came together and developed original IOPs. We have since updated, you know, routinely every year, just tweaks here and there, added things, you know, and we went from having to file five copies, for example, you know we have to constantly update that, and where there are court rule changes to keep it consistent with what the court rules say and what our current practice is. You know, we update those.

That's mostly handled through the clerk's office. A lot of it is nothing that's remarkable that requires, you know, publicizing that we made a change. It's more like this is what our current practice is. So that's how it's happened. Our management group in

the clerk's office, we do most of that. And like I said, it's usually kind of a yearly clean up for them, making sure they're consistent with the current court rules, and then adding, if certain things have happened, like the opinion release process, I think we've changed maybe a couple of those IOPs, because of the new process. And then sometimes we have several committees in our court. One of them is a quality review committee that kind of talks about our internal policies. Sometimes out of that committee we develop IOPs to, you know, talk about things like remote requests or whatever, you know, how we can handle those. So that's where some of the IOPs come from.

MS. WITTMANN: Can a practitioner request an IOP or an amendment of an IOP or creation of one?

MR. ZIMMER: I'm not sure what that would look like. I know -- but I think that we take in a lot of feedback, and I think some of that is incorporated into some of the IOPs. But, yeah, you know, I get emails from different practitioners at times, whether it's, you know, as a group or Max or something would be an example, they might say, you know, we'd like to change your -- you know, we think it would be better if you did it this way or what have you. And I think there are some, you know, IOPs that

incorporate some of that kind of idea, and so we have had some outside influence for those. Whether that -- I don't know if you need me to create some sort of formal way to do that. But informally I think it has happened.

MS. WITTMANN: Okay. Well, those are all the questions that I have. And I just want to thank this panel so much for all of your insight and your knowledge in sharing that with us today. So thank you all, very much. Thank you.

(The Plenary session was concluded at 10:39 a.m.)

CERTIFICATE OF NOTARY

STATE OF MICHIGAN)
) SS
COUNTY OF OAKLAND)

I, Earlene Poole-Frazier, certify that this session was taken before me on the date hereinbefore set forth; that the foregoing questions and answers were recorded by me stenographically and reduced to computer transcription; that this is a true, full and correct transcript of my stenographic notes so taken; and that I am not related to, nor counsel to either party nor interested in the event of this cause.

Earlene Poole-Frazier

EARLENE POOLE-FRAZIER, CSR-2893
Notary Public,
Oakland County, Michigan
My Commission expires: March 4, 2032

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Tab B

Hot Issues in Family Law Appeals

May, 2025

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I. Appellate remedies: trial court enters orders without any supporting evidence

1. A recurring problem in family law cases is that trial courts enter custody and parenting time orders without holding evidentiary hearings, despite the fact that it is black letter law, mandated by basic due process, that a court *may not* simply issue orders from the bench after reading the pleadings in the file, or after listening to attorneys state their parties' positions; rather, orders must be based on evidence received at trial or evidentiary hearing (in the absence of an agreement of the parties).[1]

   a. Litigation, including family law litigation, may be resolved *either* by a stipulation of the parties, or by a decision of the court which must be based on evidence in the record.[2]

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[1] Under MCR 3.215(G)(1), a court may give interim effect to a FOC referee's recommended order pending a judicial de novo hearing, but MCR 3.215(F)(1) mandates that the judicial hearing be held within 21 days after a party's written objection, unless the time is extended for good cause.

[2] See also *Schlender v Schlender*, 235 Mich App 230, 233, 596 NW2d 643 (1999)("A hearing is required before custody can be changed on even a temporary basis"); *Mauro v Mauro*, 196 Mich App 1, 2, 492 NW2d 758, 759 (1992)(noting that in an earlier unpublished opinion in the same case, this Court had reversed an order changing custody without a proper hearing); *Mann v Mann*, 190 Mich App 526, 532, 476 NW2d 439 (1991)(court must make findings from admissible evidence at hearing; may not temporarily change custody by interim order when it could not do it by a final order); *Duperon v Duperon*, 175 Mich App 77, 79, 437 NW2d 318 (1989) (findings must be based on competent evidence adduced at hearing); *Truitt v Truitt*, 172 Mich App 38, 44, 431 NW2d 454 (1988)(trial court committed clear legal error where trial court made findings which were not supported by testimony at the court's own hearing); *Madden v Madden*, 125 Mich App 54, 62-63, 336 NW2d 231 (1983)(in absence of agreement of parties, court must hold evidentiary hearing and make findings).

Cf. *Spranger v Spranger*, Mich. Ct. App. No. 231265, slip op at 3 (unpublished, Jun. 29, 2001)(clear error to enter "interim" order, where trial court changed custody pending post-judgment evidentiary hearing on fear that children might be harmed by mother's potentially false allegations of child sexual abuse); *Polito v Polito*, Mich Ct App Docket No. 227786, slip op at 1 (unpublished, Nov. 3, 2000)(court must conduct evidentiary hearing and determine best interests of the children before changing custody, even on a temporary basis); *Phillips v Ross*, Mich Ct App No. 186384 (unpublished, July 26, 1996)(reversing "interim" custody order entered without evidentiary hearing); *Barlach v Forrest*, Mich Ct App No. 156942 (unpublished, Jan. 7, 1994)(vacating improper December, 1992 Order and remanding for reinstatement of September, 1992 custody order in its entirety, despite passage of about 15 months).

b. This rule is not only well settled, it continues to be emphasized by the appellate courts. See, e.g., Order, *O'Brien v D'Annunzio*, 507 Mich 976, 977 (2021), where the Supreme Court found that the trial court had erred in, without an evidentiary hearing, entering a 2017 order which suspended the appellant's parenting time, and granted the appellee full-time parenting time. The Court vacated the 2019 Order (the final order) entered after an evidentiary hearing, because it was based on events which occurred in a custodial environment that was erroneously created after the first improper order in 2017. *Id*, 507 Mich App at 577; *Ludwig v Ludwig*, 501 Mich 1075, 1075 (2018)(reversing and remanding where trial court entered reunification order without evidentiary hearing); Order, *Daly v Ward*, 501 Mich 897 (2017)("it is critical that trial courts, in the *first* instance, carefully and fully comply with the requirements of MCL 722.27(1)(c) before entering an order that alters a child's established custodial environment")(italics in original); *Grew v Knox*, 265 Mich App 333, 336 (2005).

2. In the past, the Court of Appeals consistently acted quickly and decisively — utilizing peremptory reversal orders or prompt orders in emergency appeals — to vacate custody and parenting time orders which were entered without an evidentiary hearing. The list below shows the COA's quick actions; note the date of filing the motion for peremptory reversal and the date of the COA's order —

3.

a. *Sanborn v Thompson*, Mich Ct App No. 109375 (Jul. 8, 1988)(vacating 6/1/88 order and remanding for evidentiary hearing after a 6/10/88 Application and Motion for Immediate Consideration).

b. *Porteny (Sobel) v Sobel*, Mich Ct App No. 111968 (Jan. 31, 1989)(Peremptory reversal and remand granted after a Sept. 28, 1988 peremptory motion).

c. *Fessler v Fessler,* Mich Ct. App No. 115195 (Mar. 22, 1989)(Peremptory reversal granted after a Feb. 13, 1989 peremptory motion).

d. *Ketchum v Ketchum (Deline),* Mich Ct App No. 168571 (Oct. 14, 1993)(vacating 9/24/1993 custody order after a 9/24/93 Application and Motion for Immediate Consideration);

These clear rules of law are applicable to both custody orders, and to visitation/ parenting time orders: absent a consent agreement, a court may not issue or modify such orders until after an evidentiary hearing. *See, e.g.*, *Terry v Affum*, 237 Mich App 522, 534, 603 NW2d 788 (1999) (hearing to determine the child's 'best interests' necessary for modification of parenting time order); *Hoffman v Hoffman*, 119 Mich App 79, 83, 326 NW2d 136 (1982)(in visitation dispute, court must make findings on contested best interest factors).

e. *Stonisch v Murtagh*, Mich Ct App No. 228608 (Jul. 25, 2000)(vacating 7/14/2000 trial court order modifying "parenting time" after a Jul. 19, 2000 Application and Motion for Immediate Consideration).

f. In Common Trial Court Errors in Child Custody and Visitation Cases, 69 Mich BJ 140 (Feb. 1990) (copy attached), Scott Bassett discussed the Court of Appeals' prior expeditious corrections of that fundamental legal error, pointing out that, at that time, "the Court of Appeals has exhibited a willingness to act quickly in reversing modifications of custody and visitation ordered absent a full evidentiary hearing," and that "[i]t is unfortunate that such orders are not published for the benefit of the bench and bar."

i. That article cited one of the above orders and noted that it "is illustrative of the court's reasoning in these cases," *Porteny (Sobel) v Sobel*, Mich Ct App No. 111968 (Jan.31, 1989)(peremptorily reversing custody modification order denominated as "extending visitation"):

"The circuit court erred in modifying defendant's visitation rights in a manner tantamount to awarding a change of custody without clear and convincing evidence, supported by findings of fact and conclusion of law, that the change would be in the best interests of the child." (Emphasis added).

4. These definitive and decisive appellate actions spoke directly to the appellate Courts' strong adherence to the basic, absolute requirement that trial courts have evidence in the record before issuing orders.

5. But in more recent years, the Court of Appeals appears to have watered down its prior decisive responses to orders entered without an evidentiary hearing — instead, the Court has taken various actions which do not quickly and decisively enforce the rules, statutes, and constitutional provisions requiring decisions to be based on evidence; instead they often deny relief or leave the improper order in place while purporting to grant some form of relief.[3/]

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[3] For example:

- In July, 2003, the Court of Appeals denied peremptory reversal (and stay) of a June 13, 2003 order changing custody despite the lack of evidentiary hearing, ordering only that the trial court hold an evidentiary hearing within 21 days [with the improper order remaining in effect until the November, 2003 order after evidentiary hearing]. (Order, *Bizek v Bizek*, Mich Ct App no. 249393, Jul. 10, 2003).
- In March, 2005, the Court refused to peremptorily vacate a February 4, 2005 custody order, but remanded, directing the circuit court to hold an evidentiary hearing within six weeks. (Order, *Czewski v Durkee*, Mich. Ct. App. docket no. 261184, Mar. 31, 2005).
- In July, 2017, the Court of Appeals denied peremptory reversal of an order changing custody

a. This, however, does not resolve the problems mentioned by the Supreme Court in *O'Brien v D'Annunzio, supra*, because the remand hearing itself may drag on for months, similar to the evidentiary hearing discussed in *O'Brien, supra*.

b. There is a resolution available to the appellate courts, a resolution which respects the prerequisites for orders changing custody and resolves the problem of an established custodial environment being created during the appeal process – immediately, peremptorily vacate orders entered without an evidentiary hearing upon the filing of an emergency appeal or motion for peremptory reversal – just as the Court did in the 1980s and early 1990s.[4]

6. In summary, it is a violation of basic due process of law, as well as of statutes and

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despite the lack of evidence and findings — but later, on full review, vacated and remanded based on those omissions. *Espinoza v Espinoza*, Mich Ct App no. 338145 (unpublished, Oct. 12, 2017);

- In January, 2018, the Court of Appeals denied peremptory reversal (and stay) of a November 29, 2017 order entered without an evidentiary hearing [after which the Supreme Court granted a stay (docket no. 157300, Mar. 21, 2018)], and then on full consideration the Court of Appeals vacated the November, 2017 order for, *inter alia,* lack of evidence). *Lanker v Lanker,* Mich Ct App no. 341530, slip op at 3 (unpublished, May 22, 2018).
- In December, 2018, the Court of Appeals granted immediate consideration of an emergency application based on a December 12, 2018 order changing custody without evidence; but the court left that improper order in place and remanded for an evidentiary hearing within 14 days; the trial court did not issue its decision until March 8, 2019 — leaving the improper custody change order to remain in effect for fifteen months after the remand order (see Order, *Ploski v Wisz*, Mich Ct App No. 346828, Dec. 21, 2018).
- In July, 2024, the Court noted the requirement that courts take evidence before entering temporary custody orders, and remanded for a hearing within 21 days, but left the improper order in effect pending completion of the hearing (Order, *Stewart v Pickens*, Mich Ct App No. 370985, July 10, 2024).

[4] It is true that there are some more recent [than those listed in the prior footnote] Court of Appeals decisions which recognize and quickly apply the statutory rules and due process requirements for entry of orders. See, e.g., Order, *Picerno v Strimpel*, Mich Ct App no. 311619 (Aug. 28, 2012)(vacating with immediate effect, and in lieu of granting leave, a July 13, 2012 custody change order entered without an evidentiary hearing)). In *Sigler v Safran*, the Court of Appeals granted peremptory reversal and vacated the portion of a December 2018 order changing custody, reasoning "a trial court cannot change custody, even temporarily, without holding a hearing and making findings." (Order, *Sigler v Safran*, Mich Ct App no. 346992, Mar. 15, 2019). Even so, the Court of Appeals subsequently had to force the trial judge to vacate the improper order. (Order, *Sigler v Safran*, Mich Ct App no. 346992, Apr. 11, 2019).

long-standing case law (as discussed in other sections of these materials), to issue a decision without taking evidence as the basis of the decision. This fundamental rule is even more crucial in child custody cases, where the Legislature has made stability the paramount touchstone of the Child Custody Act, and has prohibited changes of custody orders except in the most compelling circumstances.

7. The increasing tendency of some trial courts to issue orders changing custody without first taking evidence is a trend that must be stopped. This apparently will only happen by (1) strong, consistent rulings from Michigan's appellate courts emphasizing that trial courts must take evidence and make the required findings before issuing orders, and (2) within a couple of weeks after the filing of an emergency appeal, consistent and quick issuance of an order which vacates an order entered without an evidentiary hearing.

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II. Additional hot topics in family law appeals

8. The transcript production system is in crisis: how can you deal with it?

9. When to Immediate Consideration motions make sense?

10. Preserving Issues for Appeal
    a. Best contents for motion for temporary relief, and for answer to motion, as well as best request for relief.

11. Remand issues
    a. Drafting the relief requested in the Court of Appeals
    b. Procedure on remand

12. Stay of proceedings

13. Use of Emergency Application versus Claim with Motion for Peremptory Reversal.

Common Trial Court Errors in Child Custody and Visitation Cases

By Scott Bassett

Custody and visitation disputes are among the most difficult cases for a circuit judge to decide. Although we have statutory standards for both types of disputes, those standards necessarily leave much room for judicial discretion. That discretion is not, however, unlimited. There are certain rules a circuit judge must follow in ruling upon any custody or visitation matter. When these rules are broken, the errors tend to fall into a few major categories.

This article will examine the most common trial court errors in custody and visitation cases, and thereby help both judge and attorney prevent them. Prevention of error at the trial court level is especially crucial in these cases since an appeal can take a year or more. The impact on a child of reversal after that span of time can be devastating.

FAILURE TO HOLD AN EVIDENTIARY HEARING BEFORE DETERMINING OR MODIFYING CUSTODY OR VISITATION

Michigan law is unequivocal on the basic principles for determining and modifying child custody and visitation orders. Custody and visitation cannot be decided or modified, absent an agreement of the parties, unless the court first holds an evidentiary hearing. *Stringer v Vincent,* 161 Mich App 429, 411 NW2d 474 (1987); *Adams v Adams,* 100 Mich App 1, 298 NW2d 871 (1980); *Pluta v Pluta,* 165 Mich App 55, 418 NW2d 400 (1979). It is not enough, absent agreement of the parties, for the court to rely on testimony from a hearing before a Friend of the Court referee. *Crampton v Crampton,* 178 Mich App 362, 443 NW2d 419 (1989); *Truitt v Truitt,* 172 Mich App 38, 431 NW2d 454 (1988). The court must hold its own evidentiary hearing.

Recently the Court of Appeals has exhibited a willingness to act quickly in reversing modifications of custody and visitation ordered absent a full evidentiary hearing. Because these reversals were by order of the court upon motions for peremptory reversal under MCR 7.211(C)(4), we do not have a series of published opinions making clear the court's willingness to correct this error on a peremptory basis.

It is unfortunate that such orders are not published for the benefit of the bench and bar. Peremptory reversal orders were recently entered in *Fessler v Fessler,* Docket No. 115195, decided March 22, 1989; *Porteny (Sobel) v Sobel,* Docket No. 111968, decided January 31, 1989; and *Sanborn v Thompson (Sanborn),* Docket No. 109375, decided July 8, 1988. The text of the *Sobel* order is illustrative of the court's reasoning in these cases and is reprinted as an appendix to this article.

FAILURE TO CONSIDER AND SEPARATELY STATE A CONCLUSION AS TO EACH OF THE FACTORS IN SECTION 3 OF THE CHILD CUSTODY ACT

Before determining or modifying a child custody order, the circuit court must evaluate and state a conclusion as to each factor in MCL 722.23, thereby determining the best interests of the child. MCR 2.517(A); *Bednarski v Bednarski,* 141 Mich App 15, 366 NW2d 69 (1985); *Arndt v Kasem,* 135 Mich App 252, 353 NW2d 497 (1984); *Petrey v Petrey,* 127 Mich App 577, 229 NW2d 266 (1983); *Williamson v Williamson,* 122 Mich App 667, 336 NW2d 6 (1982); *Wolfe v Howatt,* 119 Mich App 109, 326 NW2d 442 (1988). Failure of the court to make specific findings and conclusions on each factor is reversible error. *Daniels v Daniels,* 165

Mich App 726, 418 NW2d 924 (1988); *Currey v Currey,* 109 Mich App 111, 310 NW2d 913 (1981); *Lewis v Lewis,* 73 Mich 563, 252 NW2d 237 (1977); *Zawisa v Zawisa,* 61 Mich App 1, 232 NW2d 275 (1975); and *Parrott v Parrott,* 53 Mich App 629, 220 NW2d 176 (1974).

Despite the abundant case law mandating findings of fact and conclusions of law on each of the "best interests" factors of the Child Custody Act, a court will occasionally violate this requirement. Clearly, if the court has failed to conduct an evidentiary hearing there will be no evidence from which findings and conclusions can be made. More than a decade ago, the Court of Appeals was obviously distressed by the number of cases it was forced to remand due to violation of this rule:

> *Numerous cases involving child custody have been remanded by this Court because of inadequate findings of fact on the trial record.*
>
> ***
>
> *We are unable to discern why such action should be so frequently necessary. The Child Custody Act of 1970 has been in effect since 1971 and provides a checklist of required factual findings to be made by the trial court. Observance of the statute is required.* Barnes v Barnes, *77 Mich App 112, 258 NW2d 65, at 66 (1977).*

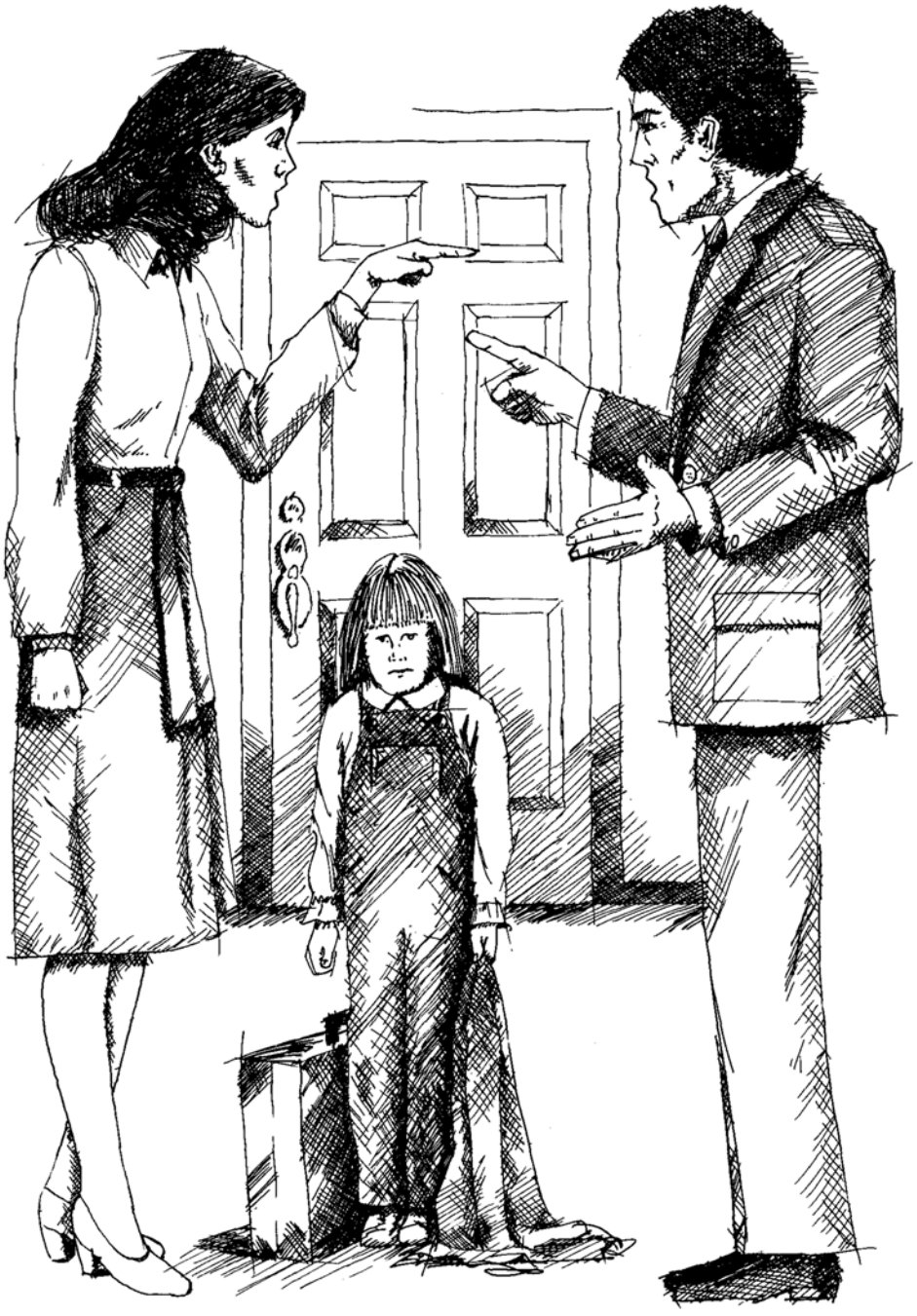
Now, 13 years after the Court of Appeals expressed its frustration in *Barnes,* we can hope that this error is not so frequently committed.

FAILURE TO DETERMINE THE EXISTENCE OF AN ESTABLISHED CUSTODIAL ENVIRONMENT

The failure of the circuit court to determine whether or not the child's custodial environment has become established with the current custodian constitutes reversible error. *Stringer, supra; Arndt, supra.* It is not enough for the court to base this determination upon either a stipulation of the parties or by reference to a custody order. *Wilson v Gauck,* 167 Mich App 90, 421 NW2d 582 (1988); *Wealton v Wealton,* 120 Mich App 406, 327 NW2d 483 (1982).

The failure of the circuit court to determine whether or not the child's custodial environment has become established with the current custodian constitutes reversible error.

Whether or not an established custodial environment exists is a question of fact to be determined by reference to the statute, which states that such an environment becomes established "if over an appreciable time the child naturally looks to the custodian



in that environment for guidance, discipline, the necessities of life, and parental comfort." MCL 722.27(1)(c). It does not matter if that environment was created with a court order, without a court order, in violation of a court order, or pursuant to a court order later reversed on appeal. *Blaskowski v Blaskowski,* 115 Mich App 10, 320 NW2d 268 (1982). An established custodial environment may even exist in the homes of both parents by virtue of a joint physical custody arrangement. *Duperon v Duperon,* 175 Mich App 61, 437 NW2d 296 (1989).

FAILURE TO DETERMINE THE PROPER BURDEN OF PROOF

Where no established custodial environment exists, the proper burden of proof is a preponderance of the evidence. *VanderMolen v VanderMolen,* 164 Mich App 448, 418 NW2d 108 (1987); *Hoke v Hoke,* 162 Mich App 201, 412 NW2d 694 (1987). However, if it has been determined that an established custodial environment exists, the party requesting that the environment be disrupted must carry a clear and convincing evidence burden. *Sedlar v Sedlar,* 165 Mich App 71, 419 NW2d 18 (1987); *Schwiesow v Schwiesow,* 159 Mich App 548, 406 NW2d 878 (1987); *Bednarski, supra; Adams, supra; Hilbert v Hilbert,* 57 Mich App 247, 225 NW2d 697 (1974). Where a party is attempting to disrupt an established joint physical custody environment, the burden is also clear and convincing evidence. *Nielsen v Nielsen,* 163 Mich App 430, 415 NW2d 6 (1987); *Duperon, supra.*

STRICTLY ENFORCING A STIPULATION AS TO CUSTODY WITHOUT INDEPENDENTLY DETERMINING THE CHILD'S BEST INTERESTS

Although it is generally true that courts should uphold stipulations by the parties, a parent may not bargain away a child's rights by agreement with a former spouse. *Sayre v Sayre,* 129 Mich App 249, 341 NW2d 491 (1983) (agreement as to child support not binding). In *Napora v Napora,* 159 Mich App 251, 406 NW2d 201 (1986), the Court of Appeals reversed a circuit court order which bound the parties to a stipulation on the issue of custody. The Court of Appeals held:

> *Despite any agreement which the parties may reach in regard to the custody of their child, where a custodial environment is found to exist, physical custody should not be changed absent clear and convincing evidence that the change is in the best interests of the child. [Citations omitted.] Accordingly, we find it necessary to remand to the trial court for consideration of whether an established custodial environment exists and, if so, whether changing custody would be in the best interests of [the child] as that term is defined by MCL 722.23; MSA 25.312(3).* Id, *at 406 NW2d 199. See also* Moser v Moser, *130 Mich App 97, 343 NW2d 248 (1983).*

In *Schwiesow, supra,* the Court of Appeals reversed a circuit judge's refusal to find an established custodial environment with the father after the parties stipulated that the father would retain physical custody for a fixed period of time, then transfer custody to the mother. As stated in *Schwiesow:*

> *Our concern is not with the reasons behind the custodial environment, but with the existence of such an environment.*
>
> ***
>
> *Unless the trial court is presented with clear and convincing evidence to warrant a contrary finding, the court shall enter a custody order after the hearing on remand in favor of preserving the established custodial environment.* Id, *at 406 NW2d 881-882.*

It should be acknowledged that there is a line of cases suggesting that a custody agreement between the parties should be dispositive. These cases generally deal with the situation where

Often this violation occurs in response to allegations of child sexual abuse made by the custodial parent against the non-custodial parent.

a party voluntarily surrenders custody in the best interests of the child, then, after a period of time, requests that custody be restored to him/her. See *Pluta, supra; Theroux v Doerr,* 137 Mich App 147, 357 NW2d 327 (1984); *Speers v Speers,* 108 Mich App 543, 310 NW2d 455 (1981); *Dowd v Dowd,* 97 Mich App 276, 293 NW2d 797 (1980); and *Miller v Miller,* 23 Mich App 430, 178 NW2d 822 (1970). However, these cases appear to run afoul of the clear public policy adopted by the Michigan Legislature in enacting MCL 722.27(1)(C). As stated in *Lyons v Lyons,* 125 Mich App 626, 336 NW2d 844 at 847 (1983):

> *In adopting the Child Custody Act, the Legislature intended to minimize the prospect of unwarranted and disruptive changes of custody and, therefore, erected a barrier against removal of children from an established custodial environment, except in the most compelling cases.*

FAILURE TO COMPLY WITH THE 21-DAY AUTOMATIC STAY

Absent a specific exception provided by statute or court rule, no court order or judgment, including one which determines or modifies custody or visitation, may be enforced until the expiration of 21 days after its entry. MCR 2.614(A)(1). MCR 2.614(A)(2)(e) provides that temporary orders in domestic relations actions are exempt from the 21-day automatic stay. However, there is no exemption, by either court rule or statute, for custody or visitation orders included in

divorce judgments or post-judgment modification orders. As stated in a widely-used text on the Michigan Court Rules:

> *Counsel is asked to note that the rule only exempts interim orders of the court from its provisions. A permanent child support, child custody, or alimony order is subject to the automatic stay provisions. Martin, Dean & Webster,* Michigan Court Rules Practice, *West, 3rd Edition, 1986, page 639, note 2.*

In *Lyons, supra,* the Court of Appeals made it clear that the automatic stay provisions of GCR 1963, 530.1 (now MCR 2.614) apply to orders modifying child custody. See also *Marshall v Beal,* 158 Mich App 582, 405 NW2d 101, at 105-6 (1986).

The existence of the automatic stay court rule is to provide some protection to parties and children from ill-advised or illegal custody and visitation modifications. During this 21-day period, the aggrieved party will have an opportunity to seek a stay order from either the trial court or the Court of Appeals, or to file motions for peremptory reversal and immediate consideration with the Court of Appeals. When the circuit court fails to abide by the 21-day automatic stay rule, it is effectively preempting any decision which might later be made by the Court of Appeals to reverse its order. This is not in the best interests of the child involved.

FAILURE TO COMPLY WITH VISITATION REQUIREMENTS

It may be a little unfair to cite this as one of the "most common" court errors since the statute has been in effect only since March 30, 1988. However, the pattern of judicial disregard for the visitation rights of the non-custodial parent is long established. MCL 722.27a(1) serves as a strong public policy statement favoring maximized visitation between the child and the non-custodial parent:

> *Visitation shall be granted in accordance with the best interests of the child. It is presumed to be in the best interests of the child for the child to have a strong relationship with both of his or her parents. Except as otherwise provided in this section, visitation shall be granted to a parent in a frequency, duration, and type reasonably calculated to promote a strong relationship between the child and the parent granted visitation.*

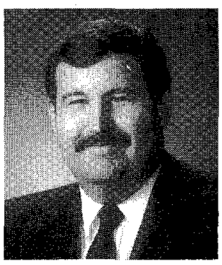
The statute then adopts a very child-oriented approach to the visitation question:

> *A child shall have a right to visitation with a parent unless it is shown on the record by clear and convincing evidence that it would endanger the child's physical, mental, or emotional health. MCL 722.27a(3).*

It is subsection 3, above, that is most often violated by our circuit judges. Visitation is often restricted, or suspended entirely, without the required evidentiary hearing and a showing on the record by clear and convincing evidence of harm to the child. Most family law practitioners have witnessed many occasions where a non-custodial parent's visitation rights have been modified, restricted, or suspended at a motion hearing, merely upon argument from the custodial parent's attorney, without taking any testimony whatsoever or placing the required evidentiary burden on the custodial parent. Often this violation occurs in response to allegations of child sexual abuse made by the custodial parent against the non-custodial parent. Those allegations should always be taken seriously, but the law of this state makes it clear that it is the custodial parent's burden to prove those allegations by clear and convincing evidence before visitation can be suspended.

What of emergency situations? Since the circuit court is not very well equipped to deal with such emergencies, and because jurisdiction over child abuse and neglect properly rests with the juvenile division of probate court, which is geared to handle emergencies, these types of issues should best be left out of circuit court proceedings until the juvenile division proceedings have reached adjudication. If the juvenile court determines that it has jurisdiction and that contact between the parent and child should be restricted, that order will supersede the circuit court's visitation or custody order until the juvenile case is dismissed. MCL 712A.2; *Matter of Brown,* 171 Mich App 674, 430 NW2d 746 (1988).

In listing these common errors, it is not my intent to offend the judiciary, but to help both bench and bar avoid some of these common and obvious errors which detrimentally affect the children of divorce. From my own practice, I know that dozens of children could have been spared the agony of disruption of their established custodial environment if only there were more strict adherence to the rule that evidentiary hearings be held before deciding or modifying custody. Violation of many of the other rules cited above also results in considerable trauma to the children involved. Together, the bench and bar can help prevent these errors and, hopefully, spare the Court of Appeals the difficult task of reversing a trial court's custody or visitation determination. ■



Scott Bassett is in private practice with Victor, Robbins & Bassett in Birmingham. He is the immediate past chairperson of the State Bar Family Law Section. Mr. Bassett is a former faculty member at the University of Michigan Law School and currently teaches family law at Wayne State University Law School and Oakland University. He is the Associate Editor of the Michigan Family Law Journal. He received his J.D. from Michigan in 1981.

Tab C

Top 20 Child Welfare Appeal Cases.
There is a dynamic, growing body of child welfare case law affecting every stage of these proceedings, from petition drafting to removal decisions, adjudication, service provision, and termination of parental rights. It is incumbent upon trial court and appellate judges as well as litigators on all sides of these sensitive cases to know, understand, and apply the holdings of these cases. This presentation covers the most important Court of Appeals and Michigan Supreme Court child welfare opinions, clarifying their holdings, underlying facts, and reach, as well as best practices for their application.

PRESENTER: Joshua Kay, J.D., Ph.D.
MODERATOR: Lynda McGhee
REPORTER: Lori Herr

Thursday, May 15, 2025, 2:15-3:30 p.m., The Atrium Study

JOSHUA KAY, J.D., PH.D. (Presenter)

Joshua Kay, J.D., Ph.D., is a clinical professor at the University of Michigan Law School, where he teaches and practices the areas of child protection, child custody, and applied psychology for lawyers. In addition to being an attorney, he is a clinical psychologist and has written extensively about the intersection of mental health, psychological evaluation, disability, and child protection law. Professor Kay has handled numerous cases at the administrative, trial, and appellate levels on behalf of children, parents, and other interested parties and frequently trains judges, attorneys, caseworkers, and other professionals on various aspects of child protection law practice and policy.

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ATTORNEY LYNDA D. McGHEE (moderator)

Lynda D. McGhee was born and raised in Detroit, Michigan attending Detroit Public Schools and graduating from Cass Tech High School. From there, she majored in Communication at the University of Michigan - Ann Arbor. She then attended Wayne State University Law School while working full time as a teacher in Detroit Public Schools. As an attorney, Lynda started a nonprofit called The Ark Nonviolence Program. Her organization helped hundreds of DPS students learn important tools that would help them succeed in life. She is now the Co-Executive Director of Michigan Children's Law Center which is a law firm that represents children.

LORI HERR (reporter).
Lori Herr is a sole practitioner at Heisler Law Office, the firm she started when she began practicing law in 2009. Lori practices in the areas of family law, handling divorce, separation, child custody, child support, spousal support cases and appeals, and she handles child welfare law matters and appeals.

In re Sanders (Individual Adjudication)
495 Mich 394 (2014)
Prior to *In re Sanders*, we had the one-parent doctrine which allowed the court to obtain jurisdiction over a child based on the adjudication of one parent yet enter dispositional orders regarding both parents. *In re Sanders* eliminated the one-parent doctrine and held that such a doctrine impermissibly infringes on the fundamental rights of unadjudicated parents without providing adequate process. *In re Sanders* held the one-parent doctrine unconstitutional. Due process demands procedural protections (e.g., adjudication) before the state can infringe on a fundamental right.

In re Lange (Neglect and Children with Severe Mental Health/Behavioral Problems)
MSC #166509 (April 14, 2025)
In this case, the child had been hospitalized because he had done and said threatening things. The hospital wanted to discharge him, but the mother persisted that the hospital had not done enough to help him. Mother refused to pick him up from hospital because of risks to the child and the household. The hospital called Children's Protective Services. DHHS filed for neglect. The trial court declined to take jurisdiction. COA reversed, and MSC agreed with the trial court. The mother had worked diligently to seek help for the child. She did not have the power, skills, or resources to help fix the child's mental state and behaviors.

This was not neglect as defined in MCL 712A.2(b)(1). Neglect requires that a parent must first have the ability to provide the necessary care and support.

> Ability: "having sufficient power, skill, or resources to do something."
>
> Neglect under MCL 712A.2(b)(2) involves "negligent treatment": failing to exercise the care expected of a reasonably prudent person in like circumstances.

There was conversation regarding what to do in these circumstances. Someone suggested the hospital should have requirements before simply discharging a child with mental health and behavioral issues.

It was mentioned that MCL 712A.2(b)(3) is not applicable to these circumstances. MCL 712A.2(b)(3) applies more to sex trafficking. It was suggested that perhaps MCL 712A.2(b)(3) should be expanded to cover cases involving mental health and behavioral health issues in adolescents. One person cautioned expanding MCL 712A.2(b)(3) as often these children need more parent involvement, opposed to being placed with the agency.

In re Dearmon (Evidence at Adjudication)
303 Mich App 684 (2014)
Prior to this case, only evidence which occurred prior to the petition being filed could be introduced at adjudication.

This case held that evidence arising after a petition is filed may be presented at adjudication if relevant to the allegations within the petition and notice has been provided to the respondent.

In this case the petitioner alleged the respondent would not leave a violent relationship that endangered the children. The respondent claimed she was not having contact with the abuser. The abuser was in jail. The jailhouse telephone audio calls, which occurred after the petition was filed, were introduced as evidence of respondent's intent to continue a relationship with the abuser.

In re Brock (Cross-examination and Privilege)
442 Mich 101 (1993)
Relevant information that would perhaps otherwise be privileged is admissible in a child protection case (MCL 722.631)

Alternative questioning methods, such as an impartial examiner and video deposition, are allowed if regular questioning is found likely to be harmful to the child witness. See MCL 712A.17b(13) and MCR 3.923(F).

The right to cross-examination is not absolute. There is no right to confront a witness because the matter is not criminal. Both sides can submit questions, but an examiner need not ask all of them or follow the wording exactly. Traumatizing witness likely to result in poorer truth-seeking, thwarting the goals of cross-examination.

In re Pederson (Plea: Advice of Rights)
311 Mich App 445 (2020)
This case clarifies the relevant portions of *In re Ferranti*, 504 Mich. 1 (2019). In *In re Ferranti* the trial court failed to advise the respondents of "any" of the waived rights enumerated by MCR 3.971(B)(3) or (B)(4). In *In re Pederson*, the trial court advised respondents of most of the rights listed in MCR 3.971, however, the trial court failed to advise them that their pleas could "later be used as evidence in a proceeding to terminate parental rights...." No written advice of rights form appeared in the record. Thus, the trial court erred by failing to properly advise respondents as required by MCR 3.971(B)(4) that their pleas could "later be used as evidence in a proceeding to terminate parental rights." The COA held that the error was not outcome-determinative.

Partial omissions of the advice of rights in MCR 3.971(B) do not necessarily require reversal. Facts and degree of harm must be carefully considered.

MCR 3.971(B)(3) provides the due process protections at the adjudication stage. Errors could well require reversal.

MCR 3.971(B)(4) says plea a may be used against respondent in a subsequent TPR proceeding. COA will weigh harm of the error & TPR grounds the court relied upon.

In re Walters (TPR at Initial Disposition/Aggravated Circumstances/Safety Plans & Due Process)
COA #369318 (Jan. 2, 2025)
Agency must make reasonable efforts unless aggravated circumstances exception in MCL 712A.19a(2) applies.

TPR at initial disposition is not permitted unless there are aggravated circumstances. An aggravated circumstances finding requires clear and convincing evidence.

See order in *Simonetta II*, 507 Mich. 943 (2021).

The agency can use a verbal safety plan but the agency cannot use this verbal plan to allege violations of the same. A pre-petition verbal safety plan is insufficient on due process grounds (notice) as basis to proceed to TPR.

*** *In re Barber / Espinoza Minors*, MSC Case No. 167745, is pending before the MSC and could change the holding in this case.

In re France (Anticipatory Neglect)
306 Mich App 713 (2014)
"Anticipatory neglect" only applies if kids are similarly situated. Otherwise, too speculative. Need greater showing of risk or harm.

Here, jurisdiction was based on fathers failure to recognize infant's serious illness and get treatment. The trial court ordered TPR regarding the infant and three older children based on anticipatory neglect even though there were no allegations of maltreatment of the older children. The COA rejected the trial court's reasoning due to dissimilar circumstances of the older kids and infant. How a parent treats one child may not be dispositive of how that same parent treats other children.

Also limited application of MCL 712A.19b(3)(b)(ii), failure to prevent *intentional* actions.

- Parent w/ opportunity to prevent injury or abuse failed to do so and there is reasonable likelihood of further injury if placed in the home.

In re Jackisch/Stamm – Jackisch (Domestic Violence)
340 Mich App 326 (2022)

The fact that a respondent is/was a victim of domestic violence may not be relied upon as a basis for TPR. We cannot TPR because there is a mere presence of domestic violence in the home or someone has not been able to remove themselves from the domestic violence. If a respondent was the perpetrator of domestic violence, that is an appropriate concern. If respondent's own behaviors directly harmed the children or exposed the children to harm, that's an appropriate concern.

In re Rood (Noice and Reasonable Efforts)
483 Mich 73 (2009)
Parents must have notice of proceedings, an opportunity to be heard, and an opportunity to participate in the case, including services.

There is a constitutionally-protected liberty interest of parents in the care, custody, and management of their children. There is a right to notice and a right to be heard.

In this case the agency and the court had the correct address for the father but mailed documentation to the wrong address. They also had the correct telephone number for the father but made little attempt to call him but when they tried, they did not dial the correct number. A service plan was also not provided to the father.

A service plan is essential to reasonable efforts.

In re Mason (Incarcerated Parents and Reasonable Efforts)
486 Mich 142 (2010)
Incarcerated parents must have an opportunity to participate in proceedings and the reunification process. Mere incarceration alone is not a sufficient reason for TPR. Criminal history alone also does not justify TPR.
If a child is placed with a relative, the court must consider that placement in the best interest determination for TPR.

A failure to make reasonable efforts creates "a hole in the evidence," rendering TPR premature.
Court appearance may be by phone. MCR 2.004 (MDOC custody).

In re D.M.A.N. (Placement with Relatives)
COA #364518, 364520 (Feb. 21, 2025)
Conditional reversal of TPR decision for failure to investigate possibility of relative placement.

A relative placement would impact a best interests determination.
A child has a right to relative placement if it is safe and available.
If no suitable relatives found on remand, TPR order stands. If suitable relatives are found and child placed with a relative, the trial court must determine whether TPR is still in the child's best interest.

After removal, the child was placed with the maternal grandmother. There were suspicions that the grandmother was couching the child. The department did not look into other relatives even though multiple relatives expressed interest in caring for the child. This conduct fell afoul of DHHS's statutory duties and put at risk the child's right to maintain a relationship with safe relatives.

In re JK (Treatment Compliance and Adoption)
468 Mich 202 (2003)
Compliance with a parent-agency treatment plan is evidence of the ability to provide proper care and custody.
Note: compliance and benefit required. *In re Gazella*, 264 Mich. App. 668, 692 N.W.2d 708 (2005).
Agency must create a plan that is adequate to address its concerns. Failure to do so is the agency's problem.
Don't compare foster homes and parental homes when deciding statutory TPR grounds.
No adoption can be ordered if an appeal is pending.

In re Hicks/Brown (Disability)
500 Mich 79 (2017)
Agency services must accommodate disability pursuant to Americans with Disabilities Act if agency is or should be aware of disability. In this case, it was clear that the Department had knowledge of respondent's disability.

If reasonable accommodation was not provided, then the agency cannot claim that reasonable efforts were made and TPR is improper.

Old rule about timeliness of request for accommodations cast into serious doubt. Court dismissed it as dicta from COA case (*In re Terry*, 240 Mich. App. 14 [2000]). Old rule was that request must be made when initial service plan adopted or shortly thereafter.

In re Morris (ICWA Notice and Remedy)
491 Mich 81 (2012)
If the court receives information about any criteria on which tribal membership can be based, notice to tribe and/or BIA is required. Parents cannot waive notice requirement or child's membership because that would waive tribe's rights.

File the notice and return receipt of proof of service with the court. The remedy for the notice violation is a "conditional reversal." If the child is ICWA eligible, reverse and pursue ICWA-compliant proceedings. If not, the 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 JL (Active Efforts under ICWA)
483 Mich 300 (2009)
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.

The ICWA does not categorically require the DHHS to provide services each time a new termination proceeding is commenced against a parent.

At trial there was testimony regarding the extensive services provided to respondent from 1999 to 2005 and despite these services, the respondent failed to become an adequate parent.

- The 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.
- Active efforts must be culturally appropriate.
- Active efforts must permit a current assessment.

In re White (Best Interest Findings)
303 Mich App 701 (2014)
This case clarified *In re Olive/Metts*, 297 Mich. App. 35 (2012).
If the best interests of individual children differ significantly, the court should address those differences in determining the best interests. But no need for redundant findings. For best interests, consider, in part, 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, etc.

In re A.P. (Child Custody and Child Welfare)

283 Mich App 574 (2009)
Juvenile court orders supersede custody orders. They don't modify or terminate them. An existing custody order goes dormant during juvenile proceeding. Custody order becomes active again when the juvenile case is dismissed. The judge presiding over juvenile cases can hear custody matters.

A child has a due process liberty interest in family life. A right to proper and necessary support, education, and care. In other words, the right to have a fit parent.

In re Beck (Child Support)
488 Mich 6 (2010)
TPR does not end child support obligation. The sole parental obligation defined by statute is the obligation to support the child. MCL 722.3.

Parental rights and parental obligations are different. 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 (Funding for Experts)
314 Mich App 111 (2016)
Courts must give respondents reasonable funds for expert consultation if there's a nexus between the respondent's request and the issues presented and there is a reasonable probability that an expert would be of meaningful assistance.

- Seriously ill infant ended up comatose.
- Radiologists at one hospital found no sign of trauma on MRI and CT of brain.
- Radiologists at another hospital read same scans and found signs of prior trauma.
- TPR petition filed. Parents moved for funds for expert given conflict between doctors. Trial court denied. TPR.

Here, conflict between doctors about complex evidence made expert witness funds necessary. Must use *Mathews v. Eldridge,* 424 U.S. 319 (1976), analysis because "due process is flexible and calls for such procedural protections as the particular situation demands."

COA analyzed DP under *Mathews v. Eldridge*, 424 U.S. 319 (1976).

- Private interest of parents here is commanding. The state shares the parents' interest in ensuring an accurate and just decision.
- Risk of error is very high if parents are not allowed funds for expert given complexity of evidence.
- The government's interest in saving money is not substantial enough given the stakes to deny these funds to parents.

In re Ballard (Parenting Time in Juvenile Guardianships)
323 Mich App 233 (2018)

MCL 712A.19a(14) provides the trial court with authority to order parenting time after a juvenile guardianship has been established. The court can increase, decrease, or terminate parenting time over course of guardianship.
In re Prepodnik, 337 Mich. App. 238, 975 N.W.2d 238 (2021): holds that courts can also grant grandparenting time under MCL 722.27b in JG cases. A parent must meet requirements in MCL 722.27b, and the guardian is not entitled to the presumption given to a fit parent in a decision to deny grandparenting time.

A juvenile guardianship is permanent. We must advise parents and guardians that the guardianship is permanent.

Additional Cases:

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

In re KH, 469 Mich 621 (2004): Can't terminate a putative father's parental rights, because he doesn't yet have parental rights to terminate.

In re Knipp, COA #368780 (May 23, 2024): Clock on desertion started running when putative father abandoned child, not when he perfected paternity. *See: In re LE*, 278 Mich App 1 (2008): actions prior to perfecting legal paternity may be considered for TPR.

20 CHILD WELFARE CASES EVERYONE SHOULD KNOW

Joshua B. Kay, J.D., Ph.D.
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In re Sanders (Individual Adjudication)

- 495 Mich. 394, 852 N.W.2d 524 (2014)
- **Due process requires adjudication of a parent before a court can exercise its dispositional authority regarding that parent.**
  - Based on *Stanley v. Illinois,* 405 U.S. 645 (1972)
- In *Sanders*, mother pled. Father stripped of trial rights, given supervised parenting time, required to follow a service plan, and has no right to have placement or arrange for placement of kids.

Sanders continued

- 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. Cites numerous cases in support:
  - *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.

In re Lange (Neglect and Children with Severe Mental Health/Behavioral Problems)

- MSC #166509 (April 14, 2025)
- **Neglect under MCL 712A.2(b)(1) requires ability to provide necessary care and support.**
  - Able: "having sufficient power, skill, or resources to do something." Mother here did not have ability.
- **Neglect under MCL 712A.2(b)(2) involves "negligent treatment": failing to exercise the care expected of a reasonably prudent person in like circumstances.**
- Here, child had long history of dangerous behaviors and threats. Mother refused to pick him up from hospital because of risks to child and household. DHHS filed for neglect, and trial court declined to take jurisdiction. COA reversed, and MSC agreed with trial court.

In re Dearmon (Evid. at Adjudication)

- 303 Mich. App. 684, 847 N.W.2d 514 (2014)
- **Evidence that arises after a petition has been filed may be presented at adjudication if relevant to allegations in petition and respondent has notice of evidence.**
- Petitioner alleged respondent would not leave violent relationship that endangered the children.
- Respondent claimed no voluntary contact w/ abuser.
- Jailhouse telephone audio from after the petition was filed was introduced as evidence of respondent's intent to maintain relationship with abusive partner.

In re Brock (Cross-Exam & Privilege)

- 442 Mich. 101, 499 N.W.2d 752 (1993)
- **Alternative questioning methods, such as an impartial examiner and video deposition, are allowed if regular questioning found likely to be harmful to child witness.**
  - See MCL 712A.17b(13) and MCR 3.923(F)
- **The right to cross-examination is not absolute.**
  - No 6th Amendment right to confrontation, because not criminal.
  - Both sides can submit questions, but examiner need not ask all of them or follow their wording exactly.
  - Traumatizing witness likely to result in poorer truth-seeking, thwarting the goals of cross-examination.
- **Relevant info that would otherwise be privileged is admissible in a child protection case (MCL 722.631)**

In re Pederson (Plea: Advice of Rights)

- 311 Mich. App. 445, 951 N.W.2d 704 (2020)
- **Partial omissions of the advice of rights in MCR 3.971(B) do not necessarily require reversal. Facts and 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 plea may be used against respondent in subsequent TPR proceedings. COA will weigh harm of the error & TPR grounds court relied upon.
- Clarifies the relevant portion of *In re Ferranti*, 504 Mich. 1, 934 N.W.2d 610 (2019).

In re Walters (TPR at Initial Disposition / Aggravated Circ. / Safety Plans & Due Process)

- COA #369318 (Jan. 2, 2025)
- **Agency must make reasonable efforts unless aggravated circumstances exception in MCL 712A.19a(2) applies.**
  - See also *Simonetta III*, 340 Mich. App. 700 (2022).
- **TPR at initial disposition is not permitted unless there are aggravated circumstances.**
- **Aggravated circumstances finding requires clear and convincing evidence.**
  - See order in *Simonetta II*, 507 Mich. 943 (2021).
- **Pre-petition verbal safety plan is insufficient on due process grounds (notice) as basis to proceed to TPR.**

In re LaFrance (Anticipatory Neglect)

- 306 Mich. App. 713, 858 N.W.2d 143 (2014)
- **"Anticipatory neglect" only applies if kids are similarly situated. Otherwise, too speculative. Need greater showing of risk or harm.**
- Here, jurisdiction was based on father's failure to recognize infant's serious illness and get treatment. Trial court ordered TPR regarding infant and three older children based on anticipatory neglect.
  - No allegations of maltreatment of the older kids.
  - Origin of A.N.: *LeFlure*, 48 Mich. App. 377, 210 N.W.2d 482 (1973).

LaFrance continued

- COA rejected trial court's reasoning due to dissimilar circumstances of older kids and infant.
- Also limited application of MCL 712A.19b(3)(b)(ii) to failure to prevent *intentional* actions.
  - Parent w/ opportunity to prevent injury or abuse failed to do so and there is reasonable likelihood of further injury if placed in home.

In re Jackisch/Stamm-Jackisch (DV)

- 340 Mich. App. 326, 985 N.W.2d 912 (2022)
- **The fact that a respondent is/was a victim of domestic violence may not be relied upon as a basis for TPR.**
  - See also *In re Plump*, 294 Mich. App. 270 (2011).
- Perpetration of DV is an appropriate concern.
- If respondent's own behaviors directly harmed the children or exposed them to harm, that's an appropriate concern.

In re Rood (Notice & Rsbl Efforts)

- 483 Mich. 73, 763 N.W.2d 587 (2009)
- **Parents must have notice of proceedings, an opportunity to be heard, and an opportunity to participate in the case, including services.**
- Court first discussed the constitutionally-protected liberty interests of parents in the care, custody, and management of their children.
- Right to notice and to be heard violated in this case by notice errors of agency and court.
  - Had correct contact info, but mailed to wrong address; little attempt to contact; when attempts made, often to wrong #.

Rood continued

- Service plan not provided for father.
- Many agency policies not followed about working with parents to develop service plan, finding out if relatives available, implementing a service plan designed to address problems in the case, and parenting time.
- Service plan central to reasonable efforts.

In re Mason (Incarc. Parents & RE)

- 486 Mich. 142, 782 N.W.2d 747 (2010)
- **Incarcerated parents must have an opportunity to participate in proceedings and reunification process.**
- **Incarceration alone is not a sufficient reason for TPR.**
  - MCL 712A.19b(3)(h) includes three conditions.
  - Criminal history alone also does not justify TPR.
- **If child placed with relative, court must consider that as part of best interest determination for TPR.**
- **A failure to make reasonable efforts creates "a hole in the evidence," rendering TPR premature.**
- Court appearance may be by phone. MCR 2.004 (MDOC custody).

In re DMAN (Placement w/ Relatives)

- COA #364518, 364520 (Feb. 21, 2025)
- **Conditional reversal of TPR decision for failure to investigate possibility of relative placement.**
- Fact of relative placement would impact best interests determination.
- Child, not just parent, has a right to relative placement if safe and available.
- If no suitable relatives found on remand, TPR order stands.
- If suitable relatives found and child placed, trial court must determine whether TPR is still in child's best interests.

In re JK (Treatmt Compliance & Adoption)

- 468 Mich. 202, 661 N.W.2d 216 (2003)
- **Compliance with a parent-agency treatment plan is evidence of ability to provide proper care and custody.**
  - ***Note:*** **compliance and benefit required.** *In re Gazella*, 264 Mich. App. 668, 692 N.W.2d 708 (2005).
  - Agency must create a plan that is adequate to address its concerns. Failure to do so is the agency's problem.
- **Don't compare foster homes and parental homes when deciding statutory TPR grounds.**
- **No adoption can be ordered if appeal pending.**

In re Hicks/Brown (Disability)

- 500 Mich. 79, 893 N.W.2d 637 (2017)
- **Agency services must accommodate disability pursuant to Americans with Disabilities Act if agency is or should be aware of disability.**
- If reasonable accommodations are not made, then no reasonable efforts, and TPR is improper.
- Old rule about timeliness of request for accommodations cast into serious doubt. Court dismissed it as dicta from COA case (*In re Terry*, 240 Mich. App. 14 [2000]).
  - Old rule was that request must be made when initial service plan adopted or shortly thereafter.
  - New rule appears to be that there needs to be time to effectuate the accommodations. But agency cannot sandbag.

In re Morris (ICWA Notice & Remedy)

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

In re JL (Active Efforts under ICWA)

- 483 Mich. 300, 770 N.W.2d 853 (2009)
- **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.**
  - Court rejected futility test.
  - Active efforts involve affirmative steps, active involvement of agency workers in implementation rather than merely giving a list of services.
  - Active efforts must be culturally appropriate.
  - Active efforts must permit a current assessment.
- In this case, respondent received extensive services in recent termination cases w/ similar circumstances.

In re White (Best Interest Findings)

- 303 Mich. App. 701, 846 N.W.2d 61 (2014)
- **If best interests of individual children differ significantly, the court should address those differences in determining best interests. But no need for redundant findings.**
  - Clarified *In re Olive/Metts*, 297 Mich. App. 35 (2012), which held each child requires an individual best interests analysis at TPR.
- 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. Not exclusive list.

In re A.P. (Child Custody & Child Welfare)

- 283 Mich. App. 574, 770 N.W.2d 403 (2009)
- **Juvenile court orders supersede custody orders. They don't modify or terminate them.**
- **Existing custody order goes dormant during juvenile proceeding.**
  - Custody order becomes active again when juvenile case dismissed.
- Judges presiding over juvenile cases can hear custody matters.

In re A.P. continued

- Custody matter must have its own case number, and custody orders cannot be in juvenile orders.
- All Child Custody Act procedures must be followed, including determination of established custodial environment and best interest analysis under MCL 722.23.
- **Notes that child has 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.**

In re Beck (Child Support)

- 488 Mich. 6, 793 N.W.2d 562 (2010)
- **TPR does not end 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 (Funding for Experts)

- 314 Mich. App. 111, 885 N.W.2d 878 (2016)
- **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.**
- Seriously ill infant ended up comatose.
- Radiologists at one hospital found no sign of trauma on MRI and CT of brain.
- Radiologists at another read same scans and found signs of prior trauma.
- TPR petition filed. Parents moved for funds for expert given conflict between doctors. Trial court denied. TPR.

Yarbrough continued

- Here, petitioner's case rested entirely on expert testimony.
- COA analyzed DP under *Mathews v. Eldridge*, 424 U.S. 319 (1976).
  - Private interest of parents here is commanding. And state even shares parents' interest in ensuring an accurate and just decision.
  - Risk of error is very high if parents are not allowed funds for expert given complexity of evidence.
  - Government's interest in saving money is not substantial enough given the stakes to deny these funds to parents.
- Here, conflict between doctors about complex evidence made expert witness funds necessary. Not always the case. Must use *Mathews v. Eldridge* analysis because "due process is flexible and calls for such procedural protections as the particular situation demands."

In re Ballard (Parenting Time in JG's)

- 323 Mich. App. 233, 916 N.W.2d 841 (2018)
- **MCL 712A.19a(14) provides trial court with authority to order parenting time after a juvenile guardianship has been established.**
- Court can increase, decrease, or terminate parenting time over course of guardianship.
- See also *In re Prepodnik*, 337 Mich. App. 238, 975 N.W.2d 238 (2021): holds that courts can also grant grandparenting time under MCL 722.27b in JG cases.
  - Must meet requirements in MCL 722.27b, and guardian is not entitled to the presumption given to a fit parent in a decision to deny grandparenting time.

Additional Important Cases

- *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): Can't terminate a putative father's parental rights, because he doesn't yet have parental rights to terminate.
- *In re Knipp*, COA #368780 (May 23, 2024): Clock on desertion started running when putative father abandoned child, not when he perfected paternity
  - See also *In re LE*, 278 Mich App 1 (2008): actions prior to perfecting legal paternity may be considered for TPR.

Additional Important Cases (cont'd)

- *In re MU*, 264 Mich. App. 270, 690 N.W.2d 495 (2005): No conviction required for "criminality" under MCL 712A.2(b)(2).
- *In re Moss*, 301 Mich. App. 76, 836 N.W.2d 182 (2013): Best interest finding at TPR based on preponderance of the evidence, not clear and convincing evidence.
- *In re Ferranti*, 504 Mich. 1, 934 N.W.2d 610 (2019): No *in camera* interviews; omissions during advice of rights when taking a plea may require reversal.
- *In re Mota*, 334 Mich. App. 300, 964 N.W. 2d 881 (2020): Can combine adjudication and dispositional hearings (and evidence) in TPR at initial disposition cases as long as findings are distinct.

Tab D

Reporter notes Reasonable Efforts presentation – 061925

Reasonable Efforts and *Ferranti* Appeals: Focusing Appeals on Issues that Matter

Issue-spotting and preserving the record for appeals with a focus on errors in the adjudicatory process for all parties.

MODERATOR: Elizabeth McCree
REPORTER: Lori Herr

Thursday, May 15, 2025, 4:00-5:15 p.m., The Atrium Study.

Elizabeth McCree held multiple polls during her session to engage the audience. Each question provided the audience with a scenario and then required the audience to select the best "reasonable efforts" for that scenario. Elizabeth discussed real issues in child welfare law and the audience was able to hear real experiences and real solutions to common problems which are repeated too often in child welfare proceedings.

Her written materials included some of the important holdings from *In re Ferranti*, 504 Mich 1 (2019):

· "This Court's decision in *In re Hatcher*, 443 Mich 426 (1993), generally bars a parent from raising errors from the adjudicative phase of a child protective proceeding in the parent's appeal from an order terminating his or her parental rights. The Hatcher rule rests on the legal fiction that a child protective proceeding is two separate actions: the adjudication and the disposition. … **Hatcher was wrongly decided, and we overrule it**." Ferranti, 504 Mich at 7-8.

· "… **the trial court violated the respondents' due-process rights by conducting an unrecorded, in camera interview** of the subject child before the court's resolution of the termination petition, a different judge must preside on remand." Ferranti, 504 Mich at 7-8.

· "In taking the respondents' pleas, **the court did not advise them that they were waiving any rights. Nor did the court advise them of the consequences of their pleas**, as required by our court rules. See MCR 3.971.

· "… **the court did not advise the respondents that they could appeal its decision to take jurisdiction** over [the child]." Ferranti, 504 Mich at 9-10.

Additionally, Elizabeth suggested that a new practitioner, or a seasoned one, could look to *In re Ferranti* for a helpful analysis of child welfare proceedings in general.

In ***In re Ferranti***, 504 Mich 1 (2019), the Michigan Supreme Court made multiple substantive rulings, each of which could present viable appeal issues in child protective proceedings. These issues should be preserved in the trial court by appropriate objections, motions in limine, offers of proof, or some other manner of making the record.

In child protective proceedings, all parties, including the child through the Lawyer Guardian Ad Litem (LGAL), may make a number of arguments using *Ferranti* as authority.

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Some of the important *Ferranti* rulings include the following:

"This Court's decision in *In re Hatcher, 443 Mich 426 (1993)*, generally bars a parent from raising errors from the adjudicative phase of a child protective proceeding in the parent's appeal from an order terminating his or her parental rights. The *Hatcher* rule rests on the legal fiction that a child protective proceeding is two separate actions: the adjudication and the disposition. … ***Hatcher* was wrongly decided, and we overrule it**." *Ferranti*, 504 Mich at 7-8.

"… the **trial court violated the respondents' due-process rights by conducting an unrecorded, *in camera* interview of the subject child** before the court's resolution of the termination petition, a different judge must preside on remand." *Ferranti*, 504 Mich at 7-8.

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"… **the court did not advise the respondents that they could appeal its decision to take jurisdiction** over [the child]." *Ferranti*, 9-10.

***

In addition to the above holdings, in *Ferranti*, the Michigan Supreme Court also provided a helpful overview of child protective proceedings:

Child protective proceedings are governed by the juvenile code, *MCL 712A.1 et seq.*, and Subchapter 3.900 of the Michigan Court Rules. Any person who suspects child abuse or neglect may report their concerns to the Department. *MCL 712A.11(1)*. The Department, after conducting a preliminary investigation, may then petition the Family Division of the circuit court to take jurisdiction over the child. *MCR 3.961(A)*. That petition must contain, among other things, "[t]he essential facts" that, if proven, would allow the trial court to assume jurisdiction over the child. *MCR 3.961(B)(3)*; see also *MCL 712A.2(b)*. After receiving the petition, the trial court must hold a preliminary hearing and may authorize the filing of the petition upon a finding of probable cause that one or more of the allegations are true and could support the trial court's exercise of jurisdiction under *MCL 712A.2(b)*. See *MCR 3.965(B)*.6. *Ferranti*, 14-15.

If the court authorizes the petition, the adjudication phase follows. The question at adjudication is whether the trial court can exercise jurisdiction over the child (and the respondents-parents) under *MCL 712A.2(b)* so that it can enter dispositional orders, including an order terminating parental rights. See *Sanders, 495 Mich at 405-406*. The court can exercise jurisdiction if a respondent-parent enters a plea of admission or no contest to allegations in the petition, see *MCR 3.971*, or if the Department proves the allegations at a trial, see *MCR 3.972*. "If a trial is held, the respondent is entitled to a jury, the rules of evidence generally apply, and the petitioner has the burden of

proving by a preponderance of the evidence one or more of the statutory grounds for jurisdiction alleged in the petition." *Sanders, 495 Mich at 405* (citations omitted). And "[w]hile the adjudicative phase is only the first step in child protective proceedings, it is of critical importance because the procedures used in adjudicative hearings protect the parents from the risk of erroneous deprivation of their parental rights." *Id. at 405-406* (quotation marks, citation, and brackets omitted). **The adjudication divests the parent of her constitutional right to parent her child and gives the state that authority instead**. *Ferranti*, 14-16.

Once the trial court's jurisdiction is established, the case moves to the dispositional phase. In this phase, the trial court has "broad authority" to enter orders that are "appropriate for the welfare of the juvenile and society in view of the facts proven and ascertained." *Id. at 406*, quoting *MCL 712A.18(1)*. During the dispositional phase the court must hold review hearings "to permit court review of the progress made to comply with any order of disposition and with the case service plan [i.e., the family treatment plan] . . . and court evaluation of the continued need and appropriateness for the child to be in foster care." *MCR 3.975(A)*. If the child is removed from the family home, the court must conduct a permanency planning hearing within 12 months from the date of removal. *MCL 712A.19a(1)*; *MCR 3.976(B)(2)*. This hearing results in either the dismissal of the petition and family reunification, or the court ordering the Department to petition for the termination of parental rights. *MCL 712A.19a(4)*; *MCR 3.976(A)*. *Ferranti*, 14-16.

If the Department files a termination petition, the court holds a termination hearing. See *MCR 3.977*. The court acts as fact-finder, *MCR 3.977(I)*, and the rules of evidence generally do not apply, *MCR 3.977(H)(2)*. If the court determines by clear and convincing evidence that one or more statutory grounds for termination exist, see *MCL 712A.19b(3)*, the court must enter an order terminating the respondents' parental rights unless the court determines that termination is clearly not in the child's best interests. *In re Trejo, 462 Mich. 341, 344 (2000)*. *Ferranti*, 14-16.

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ATTORNEY ELIZABETH McCREE (moderator)

Elizabeth McCree was born and raised in Benton Harbor, Michigan. She is a 2001 graduate of Lake Michigan Catholic High School. She received a BA in Political Science from Spelman College in 2005, a JD from Georgia State University College of Law in 2008, and a MA in World History from Georgia State University in 2013.

Elizabeth began her legal career in Georgia in 2008, serving as both an Assistant District Attorney and a Criminal Defense attorney. She handled over 100 criminal jury trials during her tenure in Georgia, ranging from driving offenses to death penalty murder cases.

In 2013 Elizabeth moved back to Michigan and worked as an Assistant Prosecuting Attorney in the Muskegon County Prosecutor's Office, focusing on juvenile delinquency cases and child protection cases. In 2015 she moved back to Southwest Michigan and opened her own law firm, The Law Office of Elizabeth L. McCree, PLLC in her hometown of Benton Harbor. Her firm focuses on service as a lawyer guardian ad litem for children in foster care and for children and adults with disabilities in guardianship and conservatorship cases, in addition to juvenile

delinquency cases, education law, expungement, and probate and estate planning. Elizabeth serves on several local, regional, and state boards including The Readiness Center, the Health Equity Committee of the Corwell South Board of Directors, and the Children's Law Council of the Michigan State Bar Association. She has authored several appellate briefs in juvenile delinquency and child protection matters in Michigan since 2013. Elizabeth also teaches History, Political Science, and Legal Studies courses at Andrews University and serves as a coach for the mock trial team.

LORI HERR (reporter).
Lori Herr is a sole practitioner at Heisler Law Office, the firm she started when she began practicing law in 2009. Lori practices in the areas of family law, handling divorce, separation, child custody, child support, spousal support cases and appeals, and she handles child welfare law matters and appeals.

Reasonable Efforts and Ferranti Appeals

15 - 15 May 2025

Poll results

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Table of contents

Multiple-choice poll

What is your (primary) role in child welfare cases?

0 0 9

(1/3)

Justice

0 %

COA Judge

11 %

Trial Court Judge

0 %

Trial Court Referee

0 %

Appellate Counsel-Parent

0 %

Appellate Counsel-LGAL

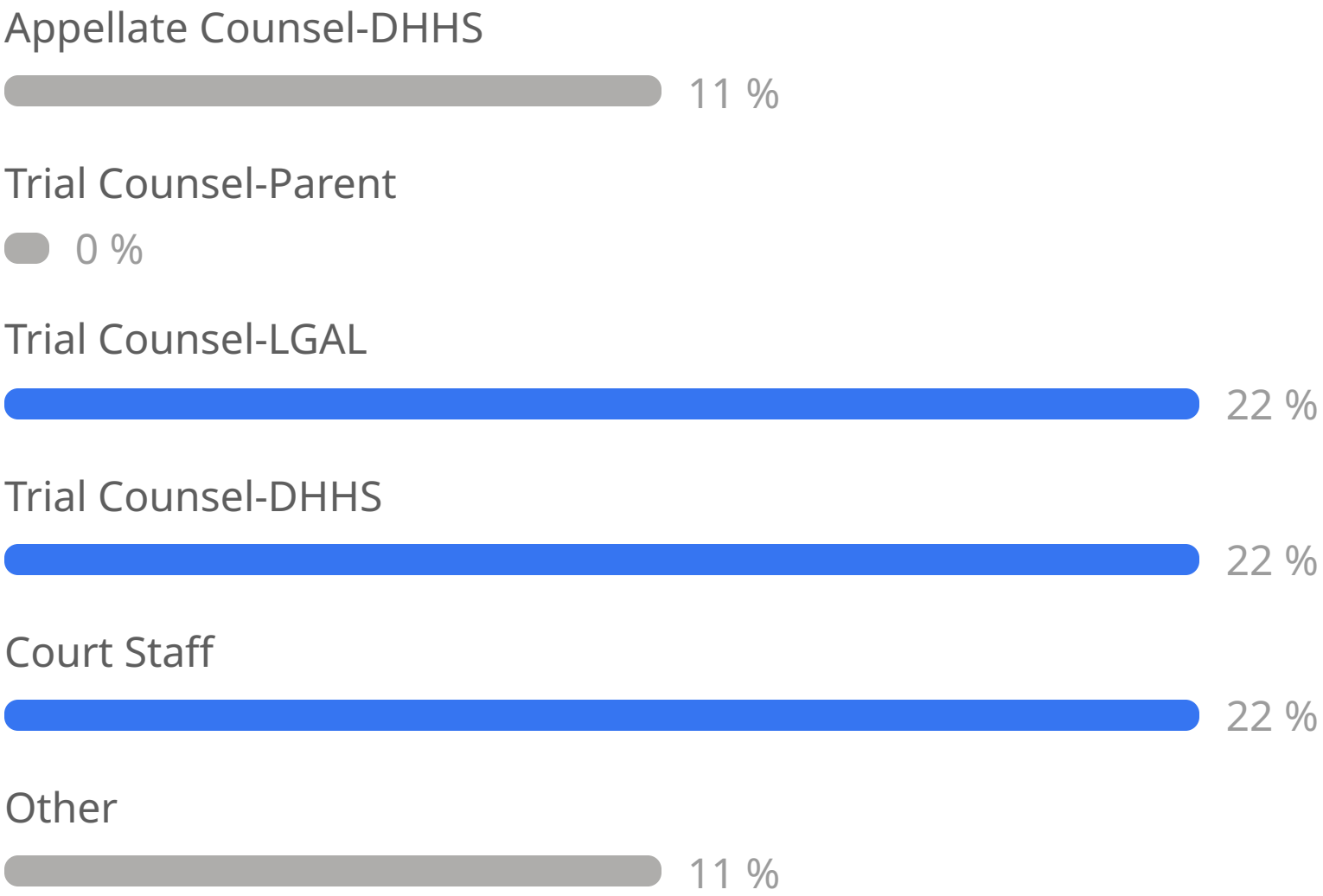
0 %

Multiple-choice poll

What is your (primary) role in child welfare cases?

0 0 9

(2/3)



What is your (primary) role in child welfare cases?

0 0 9

(3/3)

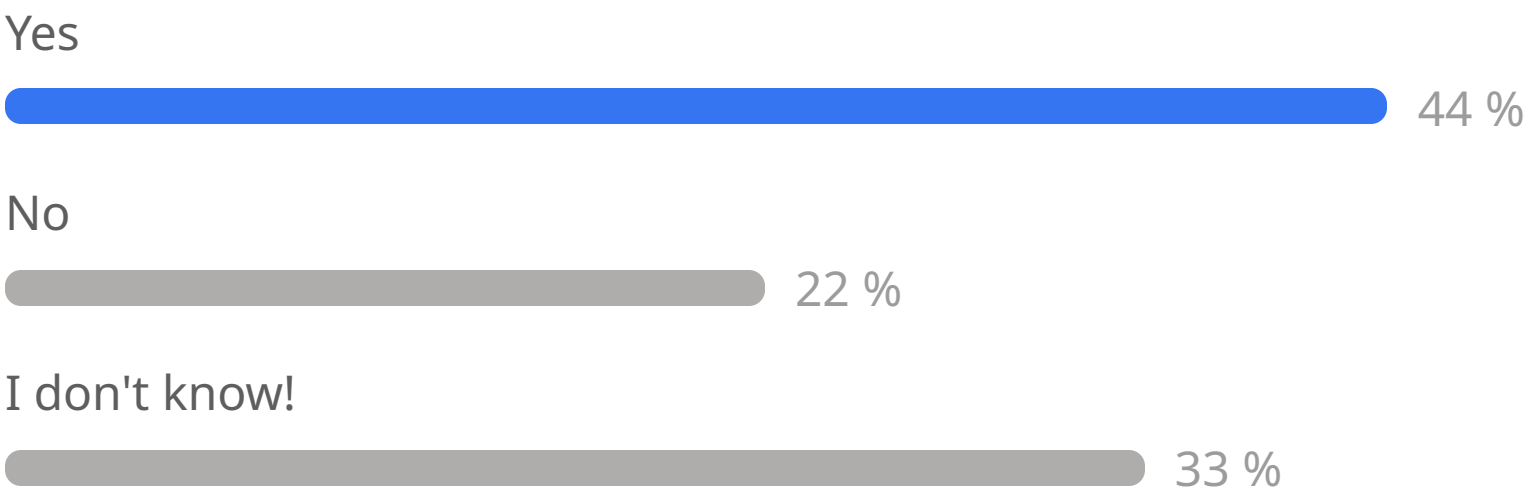
I'm not involved in child welfare cases and I don't know why I'm here!

0 %

Multiple-choice poll

Have you participated in a Ferranti appeal?

0 0 9



What is the purpose of a Ferranti Appeal?

009

- Appeal at the start of the adjudication and dispo
- Ensuring parents have due process
- Reasonable efforts
- Due process and reasonable edits efforts
- Due process
- Challenging jurisdiction / adjudication when not previously raised
- Assess reasonable efforts
- Appeal at adjudication
- Reasonable efforts

Only a respondent parent can appeal an adjudication decision after the initial order of disposition under Ferranti

0 1 0

True

10 %

False

90 %

What are potential PROCEDURAL due process issues that can be raised in a Ferranti Appeal?

007

- Parent does not receive service of petition Inmate is not writtes out if jail prison for hearing and hearing proceeds No Reasonable efforts
- Notice and advice of rights
- Advice of rights: ineffective assistance; parenting time issues
- Failure to personally serve the parents with the petition Failure to review parents' rights before taking a plea.
- Advice of rights Lack of court appointed attorney
- Lack of notice
- Failure to tell ANY party that rights may be terminated

What are potential SUBSTANTIVE due process issues that can be raised in a Ferranti appeal?

0 0 7

- ICWA/MIFPA findings not made
- Services - reasonable? ADA issues
- Services not offered
- No aggravating circumstances findings made
- Reasonable efforts
- Reasonable efforts
- Failure to provide services to the child before removal
- Allegations insufficient for jurisdiction
- Lack of reasonable efforts to keep the family together
- Efforts not reasonable

Which is the most appropriate reasonable effort to prevent removal: Parent has missed several medical appointments for a medically fragile child due to a breakdown of their vehicle that they can't afford to fix

0 1 1

(1/2)

1. DHHS investigator gets a release signed by the parent and speaks to the medical provider about options regarding appointments, such as virtual appointments or meeting at a location closer to the parent

3.64

2. DHHS investigator gives the parent information for a local nonprofit that repairs and donates vehicles and sits with the parent to sign up online for an appointment

3.36

3. DHHS investigator refers the parent to the SER worker to see if they qualify for funds to fix the vehicle

2.64

Which is the most appropriate reasonable effort to prevent removal: Parent has missed several medical appointments for a medically fragile child due to a breakdown of their vehicle that they can't afford to fix

0 1 1

(2/2)

4. DHHS holds a Family Team Meeting where the investigator asks the parent to identify options for transportation and creates a verbal safety plan detailing the discussion

1.64

5. DHHS gives the parent bus tokens

1.36

Which is the most appropriate reasonable effort to prevent removal: Mother overdoses and is hospitalized. She was at home with her 3-month-old baby during the overdose. Mother tells CPS the child's father can take the baby. CPS learns father is putative.

0 0 6

(1/2)

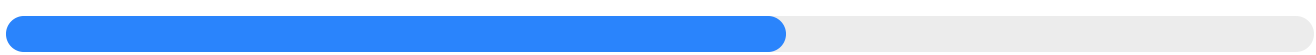
1. CPS facilitates the signing of an affidavit of parentage

4.00

2. CPS runs a background check and temporarily places the child with the father and tells the father to go to the court to initiate a paternity case.

2.33

2. CPS contacts the county agency tasked with initiating court approved DNA tests



2.33

Which is the most appropriate reasonable effort to prevent removal: Mother overdoses and is hospitalized. She was at home with her 3-month-old baby during the overdose. Mother tells CPS the child's father can take the baby. CPS learns father is putative.

0 0 6

(2/2)

4. CPS confirms the father is putative and files a petition for removal

1.17

Which is the most appropriate reasonable effort to prevent removal: 14-year-old is acting out, refusing to go to school and is skipping to hang out with older friends. Youth is on probation for truancy. Youth tells CPS worker he struggles to read.

0 0 8

(1/2)

1. CPS worker asks parent if the child has an IEP

2.88

1. CPS worker sets a meeting with the school and the probation officer to learn more about what's been going on at school

2.88

3. CPS worker schedules for the child to have a psychological evaluation with IQ testing

2.00

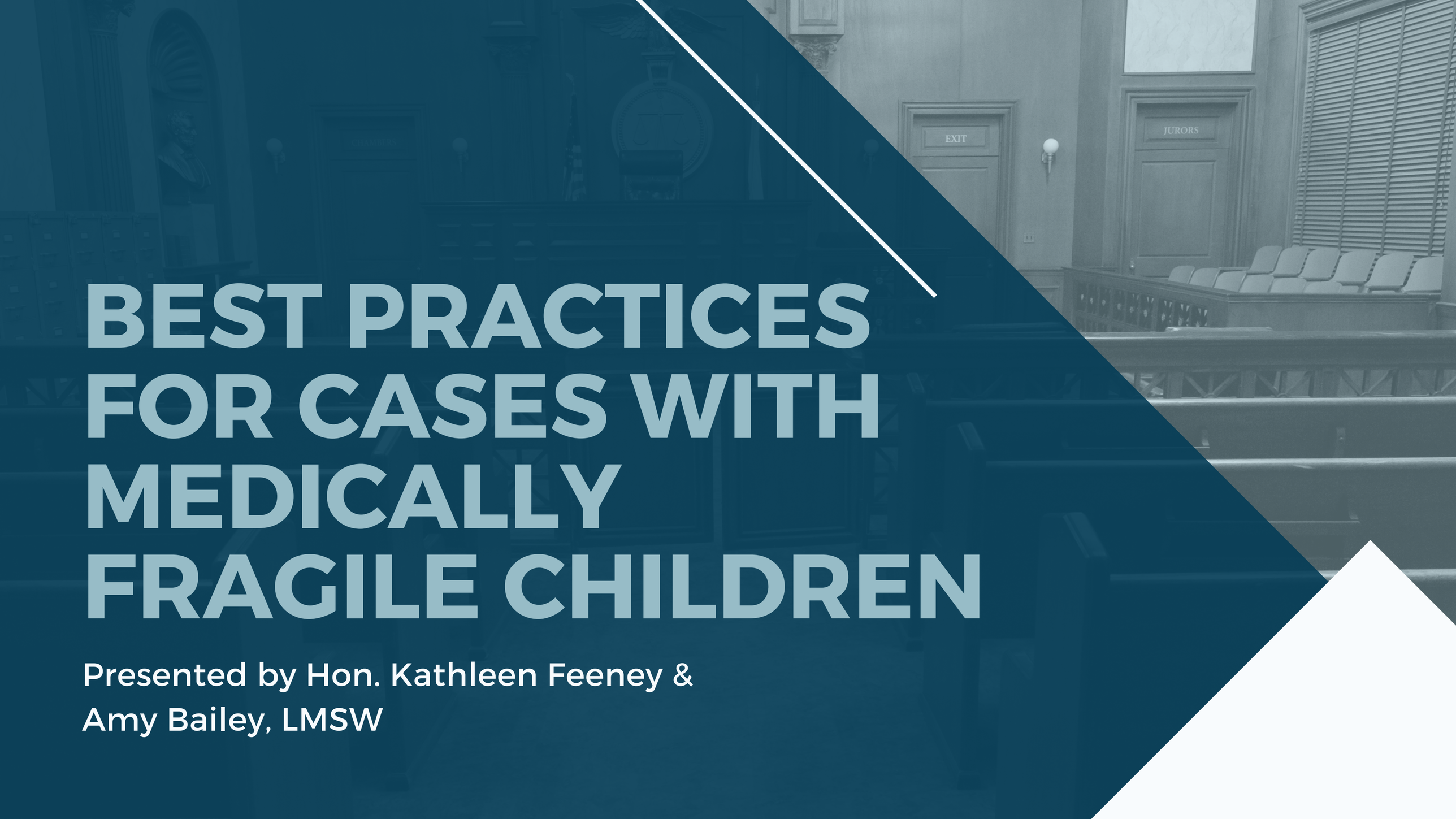
Which is the most appropriate reasonable effort to prevent removal: 14-year-old is acting out, refusing to go to school and is skipping to hang out with older friends. Youth is on probation for truancy. Youth tells CPS worker he struggles to read.

0 0 8

(2/2)

4. CPS worker has custodial parent sign a safety plan saying they will do everything they can to get the child to school.

0.75



BEST PRACTICES FOR CASES WITH MEDICALLY FRAGILE CHILDREN

Presented by Hon. Kathleen Feeney &
Amy Bailey, LMSW

Today's Outline

Topic Highlights

Introduction & Background
Defining "medically fragile"
Hearing stages
Worker expectations
Consents for Medical Treatment
Risk of harm considerations
Secondary trauma

A JUDGE'S PERSPECTIVE

MEDICALLY FRAGILE CHILDREN COME IN ALL SHAPES AND SIZES—AND THEY DESERVE CAREFUL CONSIDERATION AND TREATMENT

Background

Medically Fragile Foster Care

Our Goal:

Create, and then implement, a model that will integrate a medically fragile child's case within the multi-layered systems of child welfare, healthcare and the court to improve outcomes related to health, safety, permanency, & well-being.

DEFINITION OF "MEDICALLY FRAGILE"

“Children who are medically fragile have at least one chronic physical condition that results in prolonged dependency on medical care.”

Foster Family Based Treatment Association, Best Practices in Treatment Foster Care for Children and Youth with Medically Fragile Conditions, 2013

BEST PRACTICES FOR JUDICIAL OFFICERS

EMERGENCY REMOVAL

- ·Considerrequiring a showing of Reasonable Efforts specific to medically fragile child's needs and tailor order to address any immediate needs
- ·Carefully assess relatives—they may have helped provide care in the past

PRELIMINARY HEARING

- ·Set the tone & expectations for the future…CASA? CSHCS? Releases?
- ·Consider requiring a showing of Reasonable Efforts specific to medically fragile child's needs (multiple “ologist” appointments, therapies, procedures?)

·Tailor order to address any immediate needs of the child pending adjudication

DISPOSITION & REVIEWS

- ·Expect even more specifics about the child's medical needs at this stage
- ·Set clear consequences when needs not met (either by parents or in foster care)
- ·Consider conducting reviews more frequently than usual (e.g. every 30 to 60 days)

TERMINATION

- ·Expect extremely detailed Reasonable Efforts to address capacity to parent a medically fragile child
- ·As part of Best Interests analysis, expect detailed proposed plan for child post-termination that addresses ongoing medical & other needs

POST-TERMINATION

- Continue to conduct reviews more frequently (every 30 to 60 days)

JUDICIAL BEST PRACTICE TOOL

BEST PRACTICE GUIDE FOR MEDICALLY FRAGILE CHILDREN IN CHILD PROTECTIVE PROCEEDINGS

When dealing with medically fragile children, or children who have at least one chronic physical condition that results in prolonged dependency on medical care, courts, child welfare, and health care systems need to work seamlessly to improve outcomes related to health, safety, permanency and well-being. This guide is an attempt to assist judges and referees when handling cases involving medically fragile children.

This checklist applies at all phases of child protective proceedings including preliminary hearings, adjudications, dispositional hearings, permanency planning, termination, and post termination hearings including Section 45 hearings.

Medically Fragile children often present with DOC levels 3 or 4. Consider appointing a Court Appointed Special Advocate (CASA) in these cases. Judges and Referees should explore these critical areas of inquiry at each hearing:

- CHILD'S DIAGNOSIS:
  - Who is the lead physician handling the child's care?
  - Is the child signed up for Children's Special Health Care? If not, get it done ASAP.
  - Have the parents been attending doctor's appointments?
    - Are parents being notified of appointments ahead of time?
    - How many appointments have been made/missed?
    - Which appointments were missed?
    - What is the impact on the child of the missed appointments?
    - Are the parents attending doctor's appointments (in person or virtually)?
    - Are the parents being included in medical appointments (in person or virtually)?
    - Are parents receiving post-visit summaries in an understandable manner?
    - Are the parents asking questions and engaging in the doctor's visit?
  - Is the child anticipated to have surgery or medical procedures in the next 3/6/9 months? If so, obtain releases from the parents. (Obtaining court authorization for surgery is limited by MCL 722.124a).

- PARENTS' CAPACITY TO PARENT:
  - Can the parents explain the child's medical conditions? What is their understanding of the child's medical needs?
  - Have the parents met some or all of the child's medical needs?
  - Can the parents take care of daily tasks relevant to the child's needs (including for example dispensing medication appropriately, doing therapy exercises, mixing or thickening formula, maintaining smoke-free environments, administering eye drops, administering breathing treatments, working g-tubes, and toileting)?
  - Can the parents document the child's daily care needs (and what they are doing during parenting time)?
  - What have service providers done to assist the parents in meeting the child's medical needs?
  - Do the parents suffer from cognitive or developmental delays that impede their abilities to provide for the child's medical needs? (i.e., a *Hicks/Brown* scenario) If so, what additional reasonable efforts need to be made to assist the parents?
  - Can the parents maintain and operate any necessary medical equipment?
  - Are there environmental factors that need to be addressed, such as smoking cessation programs, dedicated circuits in the residence, ramps in the home, etc.?

- PARENTING TIME:
  - How does the child's diagnosis impact parenting time, i.e., length, location, frequency?
  - What can or should the parents do during visits? Feeding? Changing? PT/OT exercises? Administer medications?
  - Is the child enjoying sibling visits?
  - Are the visits child-centered or held outside in child-friendly locations (i.e., fully accessible playgrounds)?
  - If the child is hospitalized, is the parent visiting at the hospital? Are the visits supervised by hospital staff/agency staff or case aid/third party? Is a visitation plan for a hospitalized child written and presented to the parents?
  - What did the case manager observe during visits that speaks to the parent's ability to perform any necessary medical care, feeding, changing, etc.?
  - Can services be put in place during parenting time to assist the parent or to engage the parent more fully in the visits?

- CASE MANAGER QUERIES:

  - Does the case manager have the child's medical history and all files and information from the doctors and service providers (PT/OT/Speech, Early On, Ken O Sha, etc.)?
  - Has the agency explored relative placement? Are the relatives assessed to determine whether they can meet the child's needs (even before the pick up order is requested)?
  - Provide a summary to the court and the attorneys explaining the child's diagnoses, made and missed appointments with doctors, therapists, treatment professionals, and any prognosis statements from the medical providers.

- SURGERY/HOSPITALIZATION:
  - Are the parents aware of the child's need for surgery or hospitalization?
  - Are the parents attending pre-op appointments and receiving advance notice of those appointments?
  - Have the parents signed all necessary paperwork to permit the surgery to occur?
  - Are the parents at the hospital on time prior to surgery?
  - Do the parents remain at the hospital post-op?
  - Are the parents participating in person or virtually?
  - Is the worker attending the pre-op and post-op events?
  - What is the discharge plan from the hospital?
    - Is there additional training that needs to be done before the child is discharged?
    - Have relatives been assessed and invited to attend trainings prior to discharge?

Created in 2021 by Michigan Medically Fragile Foster Care (MiMFFC) Workgroup members Honorable Kathleen A. Feeney, Honorable Deborah L. McNabb, Attorney Stacy VanDyken, & Amy Bailey, LMSW

Information on the unique child's needs

Written summary to the court and the attorneys explaining the child’s diagnoses, made and missed appointments with doctors, therapists, treatment professionals, and any prognosis statements from the medical providers

Current/upcoming medical or service needs

Any consents needed for the child? Any unmet service needs and how is this being addressed? Have there been hospitalizations or medical emergencies?

Risk of harm & quality of life

What will happen to this child if needs aren't met? Are the parents participating in the child's medical appointments and following medical guidance? Any risk of fatality factors relevant to this child's diagnoses?

Parenting time & sibling information

What did the case manager observe during visits that speaks to the parent’s ability to perform any necessary medical care, feeding, changing, etc.? Where do visits occur and are these centered on the child? Are sibling visits occuring?

WHAT TO EXPECT FROM WORKERS

Consent for Medical Treatment Part I

MCL 722.124a

- Is it routine, nonsurgical care or an emergency?
  - If yes, MDHHS, agency and the court has authority to consent **immediately upon placement outside of home** even if not yet in a foster home. *In re AMB*, 248 Mich App 144, 178-182 (2001)
  - What qualifies as an "emergency" typically requires a hearing with medical testimony

Note: COA has found a psychological evaluation to be routine care. *In re Trowbridge*, 155 Mich App 785, 787-788 (1986). MCL 712A.12 and MCR 3.923(B)

- Are the parents aware/involved? What efforts were made to include them? •Have they signed releases?

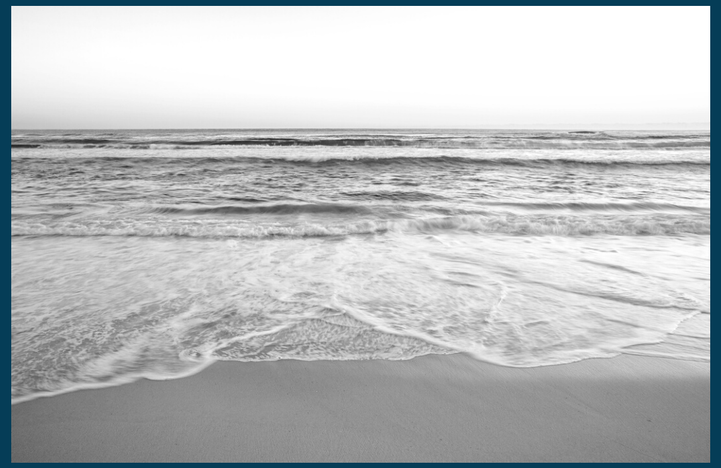
Consent for Medical Treatment PART 2

MCL 722.124a

- Has the parent been **adjudicated** (found unfit)?
  - If yes, **the court** has broad authority to make medical decisions after adjudication. *In re Deng*, 314 Mich App 615, 629 (2016)
  - If no, must delay ordering any nonroutine medical care and nonemergent surgery until after adjudication
- Withdrawal of life support - *In re AMB*

Seek thorough information on risk of harm for this particular child

"Normal" childhood needs cannot be the risk of harm standard in these cases. If this "normal" standard is used, the child may suffer, be harmed, or be at risk of fatality. What is the impact of environmental factors such as smoke? Compromised airway? Thickened formula? G-tube feedings vs feeding by mouth? Stretches at diaper changing? ASL communication? Vent maintenance?



SELF CARE!

Watching a child physically suffer is beyond the typical secondary trauma of what is a typical experience. Fatality may be an occurrence in medically fragile cases.

EDUCATE

Be aware of your specific secondary trauma symptoms and create a support system for yourself. Create a written plan, don't just wing it.

COMMUNICATE

Maintain frequent contact with your supports. Be open and honest. Ask for check-ins and accountability.

SECONDARY TRAUMA

Website

https://mimffc.org/

Resources for judges and GALs, parents, resource parents, workers, medical professionals

Get in Touch

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LGAL BEST PRACTICE GUIDE FOR MEDICALLY FRAGILE CHILDREN IN CHILD PROTECTIVE PROCEEDINGS

When dealing with medically fragile children, or children who have at least one chronic physical condition that results in prolonged dependency on medical care, courts, child welfare, and health care systems need to work seamlessly to improve outcomes related to health, safety, permanency and well-being. This guide is an attempt to assist LGALs when representing medically fragile children.

This checklist applies at all phases of child protective proceedings including preliminary hearings, adjudications, dispositional hearings, permanency planning, termination, and post termination hearings including Section 45 hearings.

Medically Fragile children often present with DOC levels 3 or 4. Consider requesting a Court Appointed Special Advocate (CASA) in these cases.

- CHILD'S DIAGNOSIS:
  - Who is the lead physician handling the child's care?
  - Is the child signed up for Children's Special Health Care? If not, get it done ASAP.
  - Have the parents been attending doctor's appointments?
    - Are parents being notified of appointments ahead of time?
    - How many appointments have been made/missed?
    - Which appointments were missed?
    - What is the impact on the child of the missed appointments?
    - Are the parents attending doctor's appointments (in person or virtually)?
    - Are the parents being included in medical appointments (in person or virtually)?
    - Are parents receiving post-visit summaries in an understandable manner?
    - Are the parents asking questions and engaging in the doctor's visit?
  - Is the child anticipated to have surgery or medical procedures in the next 3/6/9 months? If so, ensure the worker has obtained signed authorization(s) from the parents or file a motion with the court. **(Obtaining court authorization for surgery is limited by MCL 722.124a)**.

- PARENTS' CAPACITY TO PARENT:
    - Can the parents explain the child's medical conditions? What is their understanding of the child's medical needs?
    - Have the parents met some or all of the child's medical needs?
    - Can the parents take care of daily tasks relevant to the child's needs (including for example dispensing medication appropriately, doing therapy exercises, mixing or thickening formula, maintaining smoke-free environments, administering eye drops, administering breathing treatments, working g-tubes, and toileting)?
    - Can the parents document the child's daily care needs (and what they are doing during parenting time)?
    - What have service providers done to assist the parents in meeting the child's medical needs?
    - Do the parents suffer from cognitive or developmental delays that impede their abilities to provide for the child's medical needs? (i.e., a *Hicks/Brown* scenario) If so, what additional reasonable efforts need to be made to assist the parents?
    - Can the parents maintain and operate any necessary medical equipment?
    - Are there environmental factors that need to be addressed, such as smoking cessation programs, dedicated circuits in the residence, ramps in the home, etc.?

- PARENTING TIME:
    - How does the child's diagnosis impact parenting time, i.e., length, location, frequency?
    - What can or should the parents do during visits? Feeding? Changing? PT/OT exercises? Administer medications?
    - Is the child enjoying sibling visits?
    - Are the visits child-centered or held outside in child-friendly locations (i.e., fully accessible playgrounds)?
    - If the child is hospitalized, is the parent visiting at the hospital? Are the visits supervised by hospital staff/agency staff or case aid/third party? Is a visitation plan for a hospitalized child written and presented to the parents?
    - What did the case manager observe during visits that speaks to the parent's ability to perform any necessary medical care, feeding, changing, etc.?
    - Can services be put in place during parenting time to assist the parent or to engage the parent more fully in the visits?
    - **Best practice for medically fragile children would include the LGAL observing a minimum of one parenting time visit per quarter.*

- CASE MANAGER QUERIES:
    - Does the case manager have the child's medical history and all files and information from the doctors and service providers (PT/OT/Speech, Early On, Ken O Sha, etc.)?
    - Has the agency explored relative placement? Are the relatives assessed to determine whether they can meet the child's needs (even before the pick up order is requested)?
    - Prior to court proceedings, request a written summary from the case manager that outlines the child's diagnoses, made and missed appointments with doctors, therapists, treatment professionals, and any prognosis statements from the medical providers.

- SURGERY/HOSPITALIZATION:
    - Are the parents aware of the child's need for surgery or hospitalization?
    - Are the parents attending pre-op appointments and receiving advance notice of those appointments?
    - Have the parents signed all necessary paperwork to permit the surgery to occur?
    - Are the parents at the hospital on time prior to surgery?
    - Do the parents remain at the hospital post-op?
    - Are the parents participating in person or virtually?
    - Is the worker attending the pre-op and post-op events?
    - Are any new/amended parenting time orders needed during the hospitalization?
    - What is the discharge plan from the hospital?
        - Is there additional training that needs to be done before the child is discharged?
        - Have relatives been assessed and invited to attend trainings prior to discharge?

Created in 2021 by Michigan Medically Fragile Foster Care (MiMFFC) Workgroup members Honorable Kathleen A. Feeney, Honorable Deborah L. McNabb, Attorney Stacy VanDyken, & Amy Bailey, LMSW

BEST PRACTICE GUIDE FOR MEDICALLY FRAGILE CHILDREN IN CHILD PROTECTIVE PROCEEDINGS

When dealing with medically fragile children, or children who have at least one chronic physical condition that results in prolonged dependency on medical care, courts, child welfare, and health care systems need to work seamlessly to improve outcomes related to health, safety, permanency and well-being. This guide is an attempt to assist judges and referees when handling cases involving medically fragile children.

This checklist applies at all phases of child protective proceedings including preliminary hearings, adjudications, dispositional hearings, permanency planning, termination, and post termination hearings including Section 45 hearings.

Medically Fragile children often present with DOC levels 3 or 4. Consider appointing a Court Appointed Special Advocate (CASA) in these cases. Judges and Referees should explore these critical areas of inquiry at each hearing:

- CHILD'S DIAGNOSIS:
  - Who is the lead physician handling the child's care?
  - Is the child signed up for Children's Special Health Care? If not, get it done ASAP.
  - Have the parents been attending doctor's appointments?
    - Are parents being notified of appointments ahead of time?
    - How many appointments have been made/missed?
    - Which appointments were missed?
    - What is the impact on the child of the missed appointments?
    - Are the parents attending doctor's appointments (in person or virtually)?
    - Are the parents being included in medical appointments (in person or virtually)?
    - Are parents receiving post-visit summaries in an understandable manner?
    - Are the parents asking questions and engaging in the doctor's visit?
  - Is the child anticipated to have surgery or medical procedures in the next 3/6/9 months? If so, obtain releases from the parents. (Obtaining court authorization for surgery is limited by MCL 722.124a).

- PARENTS' CAPACITY TO PARENT:
    - Can the parents explain the child's medical conditions? What is their understanding of the child's medical needs?
    - Have the parents met some or all of the child's medical needs?
    - Can the parents take care of daily tasks relevant to the child's needs (including for example dispensing medication appropriately, doing therapy exercises, mixing or thickening formula, maintaining smoke-free environments, administering eye drops, administering breathing treatments, working g-tubes, and toileting)?
    - Can the parents document the child's daily care needs (and what they are doing during parenting time)?
    - What have service providers done to assist the parents in meeting the child's medical needs?
    - Do the parents suffer from cognitive or developmental delays that impede their abilities to provide for the child's medical needs? (i.e., a *Hicks/Brown* scenario) If so, what additional reasonable efforts need to be made to assist the parents?
    - Can the parents maintain and operate any necessary medical equipment?
    - Are there environmental factors that need to be addressed, such as smoking cessation programs, dedicated circuits in the residence, ramps in the home, etc.?

- PARENTING TIME:
    - How does the child's diagnosis impact parenting time, i.e., length, location, frequency?
    - What can or should the parents do during visits? Feeding? Changing? PT/OT exercises? Administer medications?
    - Is the child enjoying sibling visits?
    - Are the visits child-centered or held outside in child-friendly locations (i.e., fully accessible playgrounds)?
    - If the child is hospitalized, is the parent visiting at the hospital? Are the visits supervised by hospital staff/agency staff or case aid/third party? Is a visitation plan for a hospitalized child written and presented to the parents?
    - What did the case manager observe during visits that speaks to the parent's ability to perform any necessary medical care, feeding, changing, etc.?
    - Can services be put in place during parenting time to assist the parent or to engage the parent more fully in the visits?

- CASE MANAGER QUERIES:

- Does the case manager have the child's medical history and all files and information from the doctors and service providers (PT/OT/Speech, Early On, Ken O Sha, etc.)?
- Has the agency explored relative placement? Are the relatives assessed to determine whether they can meet the child's needs (even before the pick up order is requested)?
- Provide a summary to the court and the attorneys explaining the child's diagnoses, made and missed appointments with doctors, therapists, treatment professionals, and any prognosis statements from the medical providers.

- SURGERY/HOSPITALIZATION:
  - Are the parents aware of the child's need for surgery or hospitalization?
  - Are the parents attending pre-op appointments and receiving advance notice of those appointments?
  - Have the parents signed all necessary paperwork to permit the surgery to occur?
  - Are the parents at the hospital on time prior to surgery?
  - Do the parents remain at the hospital post-op?
  - Are the parents participating in person or virtually?
  - Is the worker attending the pre-op and post-op events?
  - What is the discharge plan from the hospital?
    - Is there additional training that needs to be done before the child is discharged?
    - Have relatives been assessed and invited to attend trainings prior to discharge?

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Tab E

Deposition Summary

Michigan Appellate Bench Bar Conference - Plenary Session on Opinion Writing and Briefing

Case name:

Date: May 16, 2025

Witness:

Location: 44045 Five Mile Road, Plymouth, Michigan

Overall Summary

This appears to be a transcript of a panel discussion rather than a deposition. The panel features Justice Elizabeth Welch of the Michigan Supreme Court, Judge Christopher Yates of the Court of Appeals, Chief Operating Officer Daniel Brubaker, and attorney John Bursch, discussing best practices in legal writing and the impact of artificial intelligence on legal work.

The panelists provide detailed guidance on writing effective Supreme Court briefs, emphasizing the importance of clear writing, proper formatting, and strategic presentation. Key recommendations include including roadmap paragraphs, providing background on specialized law, and addressing multiple audiences (commissioners, clerks, and justices). The panel emphasizes avoiding hyperbole, addressing counter-arguments directly, and maintaining professional but readable language.

Regarding artificial intelligence, the panelists express openness to AI's role in legal work while emphasizing human oversight. They describe current applications including research, case summaries, and oral argument preparation. The consensus is that AI expertise will become increasingly important for legal professionals, though it should complement rather than replace human judgment.

The discussion includes specific formatting preferences and technical considerations, such as brief length limits, citation styles, and formatting choices. The panelists debate current word limits, with some suggesting the current 16,000-word limit is too long. They also discuss the value of amicus briefs and proper handling of reply briefs.

Throughout the discussion, the panelists emphasize their major dislikes in legal writing, including hyperbole, misrepresentation of records, excessive length, and unnecessary footnotes. They consistently advocate for clear, professional writing that serves both the court and the development of law.

Table of Sections

27:8–33:2	**Practical Applications and Future of AI in Courts**
33:3–36:23	**Writing Style and Tone in Legal Documents**
36:24–40:10	**Brief Length Limits and Amicus Briefs**
40:11–43:20	**Technical Writing and Formatting Preferences**
44:3–48:21	**Reply Briefs and Issue Preservation**
48:22–50:25	**Conclusion and Court Reporter Certification**

Transcript Sections

Introduction and Panel Member Introductions ↻

The panel discussion features Justice Elizabeth Welch of the Michigan Supreme Court, Judge Christopher Yates of the Court of Appeals, Chief Operating Officer Daniel Brubaker, and attorney John Bursch. Moderated by Robert Riley and Charlie Quigg, the panelists bring diverse experience including judicial service, court administration, and appellate advocacy, including U.S. Supreme Court arguments.

1:1–1:9	The transcript is from Day 3 of the Michigan Appellate Bench Bar Conference, held on May 16, 2025, focusing on perspectives on opinion writing and briefing.
1:18–1:25	The panel includes Justice Elizabeth Welch, Judge Christopher Yates, Daniel Brubaker, and John Bursch, with moderators Robert Riley and Charlie Quigg.
2:5–2:12	Charlie Quigg introduces himself as a partner at Warner, Norcross and Judd and chair of the firm's appellate supreme court practice group.
2:23–3:4	Justice Welch has been serving on the Michigan Supreme Court since January 2021 and serves as liaison on data gathering and transparency.
3:8–3:17	Judge Yates joined the court of appeals in 2022, with previous experience as assistant U.S. attorney, federal public defender, and Kent County Circuit judge.
3:18–4:1	Dan Brubaker is the supreme court's chief operating officer and chief commissioner, having served at the court for over 20 years.
4:2–4:14	John Bursch is introduced as the founder of Bursch Law, PLLC, former Michigan solicitor general, having argued over a dozen U.S. supreme court cases.

Commissioner Brubaker's Brief Writing Recommendations ↻

Dan Brubaker outlines essential elements for successful Supreme Court briefs. He emphasizes including a roadmap paragraph, providing background on specialized law, and explaining the case's significance. Writers must address three audiences: commissioners, clerks, and justices. He recommends taking a broad view and including a clear "post-victory roadmap" explaining desired outcomes.

4:15–5:12	Dan Brubaker shares the top three things commissioners like to see in briefs: a roadmap paragraph at the beginning of arguments, background on specialized areas of law, and explanation of why the Supreme Court should be interested in the case.
5:13–5:19	Brubaker explains that brief writers must consider three audiences: commissioners, clerks, and justices.
5:20–6:13	Brubaker advises taking a "10,000 foot view" when writing briefs and explaining why a commissioner should recommend something other than a denial.
6:14–6:19	For appellees, Brubaker advises showing the Court they can deny leave to appeal without concern.
6:20–7:2	Brubaker offers to share specific factors via email and emphasizes the need to distinguish cases from others being reviewed.
7:3–7:24	Brubaker recommends including a "post victory roadmap" explaining exactly what should happen if the appeal succeeds.

Judicial Advice on Brief Writing Structure and Content ↻

Judge Yates advises starting briefs with a concise introduction and writing objective, flowing fact sections that courts can use. Justice Welch emphasizes clean visual presentation for digital reading, avoiding hyperbole, and addressing counter-arguments directly. Her clerks recommend including references to articles and statistics, and providing background on complex legal areas before presenting arguments.

8:1–8:7	Judge Yates advises starting briefs with a solid introduction of no more than two pages, ideally one page, like a 45-second elevator speech.
8:8–8:15	Judge Yates recommends writing fact sections that flow, are compelling and objective enough to be used directly in court opinions.
8:16–8:22	Judge Yates emphasizes organizing issues logically, with threshold issues presented first.
8:24–9:7	Justice Welch agrees with previous points and emphasizes avoiding hyperbole in briefs.
9:8–9:17	Justice Welch notes she reads briefs on computer and emphasizes the importance of clean visual presentation given the volume of reading.
9:18–10:8	Justice Welch shares feedback from her clerks, including the importance of addressing counter-arguments honestly and directly.
10:9–10:22	One clerk suggests including references to articles, statistics, and other states' approaches, and recommends repeating important citations for easier reference.
10:23–11:9	Justice Welch recommends providing background on complicated or technical legal areas before diving into arguments.

Preferences for Court Opinion Writing ↻

Mr. Bursch advocates for clear, professional writing in court opinions, citing Chief Justice Roberts and Justice Kagan as exemplars. He emphasizes the need for clear remand instructions to guide trial courts and supports publishing more opinions, noting difficulties when unpublished opinions constitute the majority of relevant precedents.

11:15–12:6	Mr. Bursch identifies his top three preferences in court opinions: clear and professional prose that isn't too casual, citing Chief Justice Roberts and Justice Kagen as good examples.
12:7–12:18	Mr. Bursch emphasizes the importance of unambiguous remand instructions to avoid confusion about scope and next steps at the trial court level.
12:19–13:20	Mr. Bursch advocates for publishing more opinions, noting the impracticality of having to explain citations to unpublished opinions when they form the majority.

Pet Peeves and Dislikes in Legal Writing ↻

Panel members discuss their major dislikes in legal writing. Justice Welch criticizes hyperbole and misrepresentation of records. Judge Yates objects to overly long fact sections and excessive footnotes. Brubaker highlights concerns about lengthy briefs and unsupported claims. Bursch criticizes opinions that ignore raised arguments, address unrequested issues, or include unwarranted criticism of counsel.

13:21–14:10	Justice Welch lists her dislikes in briefs, including hyperbole and taking pot shots at prior court opinions.
14:11–14:17	Justice Welch emphasizes the importance of honest representation of the record and warns against stretching facts.
14:18–15:4	Justice Welch's clerk notes concerns about protected documents that can't be copied or searched, making verification more difficult.
15:5–15:23	Justice Welch recommends following the order of questions as presented in Supreme Court orders, as justices discuss issues in that sequence.
15:24–16:9	Judge Yates expresses his greatest pet peeve is lengthy fact sections, stating that 35-40 pages to explain facts indicates missing the thread of the case.
16:10–16:17	Judge Yates criticizes overuse of footnotes, saying they should be few and brief, not multiple pages long.
16:18–17:8	Judge Yates dislikes overreliance on unpublished opinions but acknowledges trying to publish opinions when an issue has been addressed multiple times in unpublished form.
17:10–17:24	Dan Brubaker lists commissioners' top concerns: unnecessarily lengthy briefs with convoluted questions, exaggerated language, and factual claims without record citations.
17:25–18:9	Justice Welch notes extensive internal court discussions about post-decision procedures like remands and jurisdiction retention.
18:13–19:1	John Bursch's first dislike is opinions ignoring clearly raised arguments, making it difficult to explain to clients.
19:2–19:23	Bursch's second concern is courts deciding issues the parties didn't raise, suggesting at minimum allowing supplemental briefing for such issues.

19:24–20:22	Bursch's third criticism is unwarranted public criticism of counsel in opinions, sharing an example from his time as solicitor general.

Initial Discussion of AI in Legal Practice ↻

The panel explores artificial intelligence's impact on legal work. Justice Welch and Judge Yates note AI's presence in court filings and welcome its potential benefits. John Bursch describes using AI for research, generating ideas, and simulating moot courts, while emphasizing it should complement rather than replace human judgment. The panel predicts AI expertise will become essential for legal professionals.

20:23–21:3	The moderator introduces a new topic about artificial intelligence in legal practice.
21:4–21:13	Justice Welch says she hasn't knowingly seen AI-generated content yet but notes that a recent bench conference focused on generative AI and its presence in courtrooms.
21:14–21:24	Judge Yates has noticed AI-like content in pro se filings and welcomes it as it makes these submissions more comprehensible than typical handwritten filings.
21:25–22:6	Judge Yates advises attorneys to check AI-generated citations carefully but generally welcomes tools that produce better briefs.
22:7–23:1	Justice Welch shares an example of ChatGPT successfully drafting a complaint for a landlord-tenant issue and predicts AI will increase access to legal services and appeals.
23:2–24:2	When asked about AI regulations, Justice Welch discusses early resistance from judges and argues existing ethics rules sufficiently cover AI use.
24:3–24:13	Justice Welch compares AI quality to that of a summer clerk's work, suggesting it's an acceptable tool that still requires verification.
24:14–25:10	John Bursch describes his approach to AI, comparing it to how architects use precedent, and says he uses it for research and idea generation but not complete brief writing.
25:11–25:21	Bursch shares that he used AI to generate five different opening statements for a recent U.S. Supreme Court argument, which helped inspire his final version.
25:21–25:23	Bursch emphasizes that AI should not be viewed as a replacement for human capabilities.
25:24–26:6	Bursch mentions a new AI program that can simulate moot court experiences using uploaded videos of judges and case briefs.
26:7–26:22	Bursch discusses the potential of using closed AI systems to generate criticisms and counter-arguments for briefs while maintaining confidentiality.
26:23–27:2	Bursch predicts that in five years, everyone will need to be expert at AI prompts to produce better work.

Practical Applications and Future of AI in Courts ↻

Panel members discuss specific AI applications in legal work. Brubaker describes using AI for emergency case summaries and research through Westlaw's Co-Counsel. Bursch shares experience using AI to analyze lengthy statutes. Justice Welch sees AI as helpful for drafts and oral argument prep but emphasizes human oversight. Judge Yates relies primarily on law clerks but expresses interest in AI for initial case reviews.	
27:8–27:13	Dan Brubaker notes that the Michigan Judicial Council's AI work group believes existing rules adequately address legal and ethical concerns.
27:14–28:9	Brubaker describes using AI to summarize emergency cases for senior clerks, with appropriate caveats about AI-generated content.
28:10–29:5	Brubaker explains their office uses Co-Counsel on Westlaw for research and is exploring AI for generating first drafts of case summaries.
29:6–29:15	Brubaker compares AI to interns, suggesting it's currently in a middle ground between being helpful and time-consuming.
29:16–30:7	Bursch shares an example of using AI to analyze a 300-page statute to find similar provisions for a U.S. Supreme Court case argument.
30:8–30:10	Bursch notes that while AI was effective at finding relevant provisions quickly, human review was still necessary to ensure accuracy.
30:16–30:25	Justice Welch suggests AI will be helpful for first drafts but expects heavy human involvement in final work products.
31:1–31:4	Welch sees AI as particularly helpful for the Court of Appeals given their high volume of work.
31:5–31:14	Welch believes AI could assist with oral argument prep and portions of opinions like fact sections.
31:15–31:18	Welch emphasizes that AI should be viewed as a tool like Westlaw, not a replacement for judges generating opinions.
31:19–32:2	Judge Yates states he will primarily rely on "law clerk intelligence" and explains the court's research division process.
32:3–32:17	Yates mentions the court now has a two law clerk structure and describes his thorough editing process.
32:18–33:2	Yates expresses interest in using AI for initial case review, particularly for creating podcast-style introductions to complex cases.

Writing Style and Tone in Legal Documents ↻	
Panel members discuss the importance of clear, conversational writing while maintaining professional standards in legal briefs. Bursch and Justice Welch advocate for readable, well-formatted documents. Judge Yates cautions against humor in sensitive cases and uses reviewers for potentially controversial content. Brubaker recommends avoiding technical language, while Justice Welch notes occasional conflicts over grammar and terminology preferences.	
33:3–33:23	The discussion shifts to brief writing, with Bursch advocating for a conversational but professional style that is clear and concise.

33:24–34:17	Justice Welch agrees with Bursch's approach, emphasizing readability through proper formatting and accessibility while maintaining professionalism.
34:18–34:25	Judge Yates acknowledges the challenge of finding the right balance in writing style.
35:1–35:9	Yates emphasizes that humor should never be used in sensitive cases like CSC or termination of parental rights, though it may be appropriate in commercial cases.
35:10–35:22	Yates has his law clerks and wife review potentially edgy content, giving them veto power over questionable material.
35:23–36:7	Brubaker suggests avoiding technical language in briefs when possible, seeking a middle ground between overly formal and casual writing.
36:8–36:23	Justice Welch describes occasional conflicts with the reporter's office over grammar rules and terminology preferences.

Brief Length Limits and Amicus Briefs

Panel members discuss optimal brief lengths, with varying views on the current 16,000-word limit. Bursch suggests this is too long, citing the U.S. Supreme Court's 13,000-word limit. Judge Yates advocates for concise briefs of 20-25 pages. Justice Welch notes that Amicus briefs are valuable for complex issues but should avoid repeating party arguments.

36:24–37:25	The discussion turns to brief length limits, with Justice Welch expressing satisfaction with the current 16,000-word limit.
38:1–38:13	Bursch argues that 16,000 words is too many, noting that the U.S. Supreme Court has a 13,000-word limit for merits briefs.
38:14–38:22	Bursch criticizes the Eastern District of Michigan's five-page limit on reply briefs as too restrictive.
38:23–39:13	Judge Yates advocates for writing the shortest possible brief while maintaining necessary content, typically aiming for 20-25 pages.
39:14–39:25	Brubaker jokes about wanting longer briefs before clarifying that shorter is better, emphasizing giving justices only what they need to decide a case.
40:1–40:10	Justice Welch comments that Amicus briefs are helpful for complex or new issues but shouldn't simply repeat party arguments.

Technical Writing and Formatting Preferences

The panel discusses various formatting preferences in legal writing. Most support "cleaned-up parentheticals" and introductions before case statements. They debate font choices, text justification, and spacing conventions. Justice Welch opposes mixed fonts, while Bursch notes that fully justified text reduces reading comprehension. The discussion includes historical context about Times New Roman font's newspaper origins.

40:11–40:24	The panel begins rapid-fire questions, with three panelists supporting "cleaned-up parentheticals" while Judge Yates opposes them.
40:25	Justice Welch comments that AI will catch cleaned-up parenthetical issues.

41:1–41:5	The panel discusses formatting preferences, with Justice Welch opposing mixed fonts as too hard on the eyes.
41:9–41:11	The panel unanimously supports introductions before case statements.
41:12–41:19	Regarding punctuation, Justice Welch favors m-dashes, while others accept any correctly used punctuation.
41:20–42:10	The panel discusses formatting preferences including bullet points and headings, with varied preferences for centered versus justified text.
42:11–42:21	Bursch states that fully justified text decreases reading comprehension by 7% due to variable word spacing.
42:22–43:6	The panel debates spacing after periods, with some preferring two spaces while noting younger clerks use one space.
43:13–43:20	Bursch explains that Times New Roman font originated from the London Times newspaper during a paper shortage to fit more words per page.

Reply Briefs and Issue Preservation

The panel discusses word limits for briefs, with Massaron suggesting reply brief limits are too short. While Justice Welch is open to input on limits, Judge Yates expresses skepticism about reply briefs, viewing most as unnecessary repetition. The panel prefers citations in text rather than footnotes due to digital reading challenges. Bursch clarifies that while issues can be waived, arguments don't need preservation.

44:3–44:19	Mary Massaron raises a question about word limits, expressing comfort with 14,000 words for main briefs but suggesting reply brief limits are too short.
44:7–44:22	Mary Massaron suggests that reply brief word limits are too short, noting that federal courts allow longer replies to address new points and record accuracy.
44:23–45:6	Justice Welch acknowledges the court is open to input on word limits and recognizes that while short replies can be effective, there are valid points about well-done longer replies.
45:7–45:20	Judge Yates expresses skepticism about reply briefs, stating most are useless repetition, though he acknowledges some are valuable enough to change his mind.
45:21–46:2	Justice Welch agrees that many reply briefs unnecessarily repeat arguments but notes they are valuable when addressing misrepresentations.
46:3–46:8	Judge Yates cautions against long reply briefs, saying they are usually annoying.
46:9–46:17	An audience member raises concerns about lengthening questions presented due to courts finding abandonment of tangential issues.
46:18–46:23	The audience member asks about the current relevance of citational footnotes given digital reading devices.
46:24–47:24	Justice Welch discusses technical challenges with viewing footnotes in digital formats and expresses preference for citations in text rather than footnotes.

47:25–48:2	Judge Yates and Bursch agree with keeping citations in the text rather than footnotes.
48:3–48:17	Bursch emphasizes the distinction between issues and arguments, noting that while issues can be waived, arguments do not need to be preserved.
48:18–48:21	Justice Welch and Judge Yates express agreement with Bursch's point about issues versus arguments.

Conclusion and Court Reporter Certification
The panel discussion concludes at 10:03 a.m. Court reporter Laura Ambro, a Notary Public in Macomb County with commission expiring July 2026, certifies that she stenographically recorded and supervised the transcription of the proceedings to ensure accuracy.
48:22–49:4 — The panel discussion concludes at 10:03 a.m.
49:5–50:5 — The remainder of the transcript contains blank space and a reporter's certificate page.
50:7–50:13 — Laura Ambro, the court reporter, certifies that she stenographically reported the proceedings and supervised their transcription to ensure accuracy.
50:22–50:25 — The certificate identifies Laura Ambro as CSR-5882, a Notary Public in Macomb County, Michigan, whose commission expires July 5, 2026.

Transcript Text

MICHIGAN APPELLATE
BENCH BAR CONFERENCE
Day 3

In Re:
Plenary - Perspectives on Opinion Writing and Briefing:
Collective Bench/Bar Discussion on What Judges Expect
From Briefs and Lawyers Expect from Opinions
_____/

The Michigan Appellate Bench Bar Conference,
Taken at 44045 Five Mile Road,
Plymouth, Michigan,
Commencing at 9:00 a.m.,
Friday, May 16, 2025,
Before Laura Ambro, CSR-5882, US Legal Support

Panel:
Elizabeth M. Welch, Michigan Supreme Court
Christopher P. Yates, Michigan Court of Appeals
Daniel C. Brubaker, Michigan Supreme Court
John Bursch, Bursch Law, PLLC
Moderators:
Robert Riley, Honigman, LLP

25 Charlie Quigg, Warner Norcross & Judd, LLP

Plymouth, Michigan
Friday, May 16, 2025
9:00 a.m.

MR. QUIGG: Thank you, Matt. Good morning everyone. My name is Charlie Quigg. I'm a partner at Warner, Norcross and Judd where I also serve as the chair of the firm's appellate supreme court practice group. I'm happy to be here with all of you and with our wonderful panel this morning. I will now pass it over to my co-moderator, Robert Riley, for a little more introductions.

MR. RILEY: Good morning. Happy Friday. Can everybody hear okay? Great. So thanks for sticking with us until Friday. I want to continue all the great programming from yesterday, starting this morning with a session discussing what judges expect from briefs and what lawyers expect from judicial opinions.

We have a great panel this morning. And they begged us not to give formal introductions. But we can't do that given their positions. So we'll very briefly introduce each of our panelists. Justice Welch needs no introduction. She's been serving on the Michigan Supreme Court since January of 2021. She

currently serves as the liaison on data gathering and transparency for the civil, criminal, and juvenile courts, as well as liaison to the Michigan Judicial Institute. In going through her bio, the only knock I could find on her is that she graduated from Ohio State.

MR. QUIGG: All right. And then three seats to my left we have Judge Chris Yates. Judge Yates joined the court of appeals in 2022. In the fullness of his time as a lawyer and judge has developed quite a resume. He has served as an assistant U.S. attorney and attorney advisor to the Department of Justice, a federal public defender partner at two law firms, Kent County Circuit judge, and judge on the Michigan Court of Claims. We are looking forward to his perspective on things this morning.

Then seated next to Robert is Dan Brubaker. Dan is, as of about a month ago, the supreme court's chief operating officer. He still, at least for now, is also serving as the supreme court's chief

commissioner. A role he's held for the last 13 years. Before serving as chief commissioner, Dan was a commissioner at the court for another ten years. So he's been now at the court for well over 20 years.

And we welcome him to our panel this morning.

And then in the hot seat, offering the Bar's perspective on our perspectives on opinion writing this morning is my friend John Bursch. John is the founder of Bursch Law, PLLC and also serves as vice president of appellate advocacy with alliance defending freedom. In addition to his time in private practice, John is a former Michigan solicitor general. John has a stellar record in appellate courts, both federal and state. He's argued now I think more than a dozen U.S. supreme court cases and over three dozen state supreme court cases. So, we appreciate John's willingness to sit in the hot seat this morning. And with that I'll turn it back to Rob.

MR. RILEY: So jumping right in for the panel, I guess we'll start with you Dan. What are your top three things you like to see in a brief.

MR. BRUBAKER: Well, to be honest, as the chief commissioner, I'm not reading the briefs as much as I used to as a commissioner. So what I did is I polled our office. I polled the commissioners. I'm giving you the top three answers from the commissioners as to what they like to see in briefs. Number one, a roadmap paragraph at the beginning of the argument section that just kind of lays out

briefly the core of the arguments and the issues. Something that helps so that when you're moving forward, anything -- as new information appears, you can put it in context because you've had this kind of roadmap paragraph at the beginning.

Second, if it's a highly technical or specialized area of the law, like a short background section on how things typically work in that area, in a particular practice area.

Third, an explanation of why the Michigan Supreme Court should or should not be interested in your particular case. And I would say as somebody who spent -- well, let me back up. People who are writing to the Court can have kind of a difficult job because you have three audiences. You have the commissioners, you have the clerks, and you have the justices.

Obviously the justices are the most important of those audiences and they are the ones who

will decide what's going to happen with your case. But I think it helps if, when you're writing and you're looking at a brief, if you can kind of back up and take the 10,000 foot view. And imagine someone sitting in an office who is kind of a court nerd. And I can say that, but you can't, because I'm in the in group. And this person has -- like yeah, it says

right here court nerd. And this person is going to do like maybe 15 reports that month. What is it about your particular application that is going to say to that person this is the one case where you've got to stick your neck out and recommend something other than a denial. Because it's not something commissioners do lightly. They have to really think about it.

So, everyone is saying something went wrong below. You just really need to say -- there has got to be some kind of a catch in there as to why is this the one commissioner that you need to make some kind of a recommendation other than just deny these to appeal.

On the other side, if you are the appellee, you know, the 10,000 foot view is, in your response to the application, you have to convincingly let the Court know it can easily deny leave to appeal and sleep well at night. There is nothing that is going to happen if you just let this case go.

So, if you want like more particular factors, I've been here and talked before. If you want like the list of factors that we would look at, e-mail me and I'll send it to you. But I just wanted to give you, from my view, you just need something that distinguishes your case from all of the other

cases that somebody is going to be looking at that month.

And I'm sorry, but I'm going to go number four. If you would indulge me for one second. This one is just for me personally. Because I approach these cases kind of from an administrative perspective. What I like to see, if it is at all questionable, it's kind of like your post victory roadmap. You just say I want you to reverse the court of appeals. Send it back to the trial court for entry of an order disposing of the case. But sometimes it's really complicated and I need to know like if you win, or if the Justices agree with you, what do you want exactly to have happen. Do you want it to go back to the court of appeals. Do you want us to vacate. Do

you want us to reverse. Do we do that in whole or in part. Does it go back to the trial court. Is there an evidentiary hearing. What kind of instructions do we give the trial court. So it helps me and it helps the court, I think, if you get into that. If you don't, we'll figure it out. We do it. But you have then kind of lost the opportunity to be part of that conversation. And it comes up in oral arguments sometimes as well. That's it for me.

MR. RILEY: Judge Yates.

MR. YATES: I'll move through mine in the order of progression through the brief. First, start with a good solid introductory section. Never more than two pages. Ideally only one page. Think of it as your 45-second elevator speech to the panel. Or as Judge Mark Cavanaugh always used to say, tell me why you win this case. Keep it short.

Second, provide a fact section that flows, is compelling, and is completely objective. When I was writing briefs, I always tried to write my fact section so that the court of appeals could just pick the fact section up out of my brief and put it into the opinion because it was that reasonable and objective on the facts. If you can accomplish that, you've won the fact section.

And then finally, organize your issues in a logical order. If there is a threshold issue, argue it as your first issue. I can't stand when there are three or four major substantive issues that you think are winners, and then all of a sudden issue five is some threshold issue that would dispose of the appeal on jurisdictional grounds or something like that.

MR. RILEY: Justice Welch.

MS. WELCH: I agree with all that has been said already. I had sort of the usual, you know,

don't use hyperbole. Or a strong brief obviously strips out the hyperbole. We all, in our practices, we write the poison pen letter, you put it in the drawer, and you take another look the next day. I can tell you some of the most compelling writing from all of you is when there is no hyperbole. For me it's like very compelling.

I also am like one of these people visually, you know, I like it clean looking. Again, remembering that we are -- I know this is one of the questions later I think. But I do tend to read the briefs on my computer. I am looking through and maybe

I'm specifically looking at a specific issue and it's hard to find it. You know, it just is a lot of hours. Remembering we are reading truly thousands of pages a week. So, just having that in mind like how it's visually presented.

I went ahead though and I decided to ask the experts in my office, my clerks, who are all here. Oh, my goodness. They had so many thoughts. I was truly really expecting a few things back. Oh, no, they had thoughts. I thought I would share some of them with you where I felt oh yeah, that's a really good point. I agree with that too. I just didn't think to put it in those words. So obviously I think

every single one of them, and I think we can all attest to this, making sure you are addressing counter arguments honestly and directly. It's amazing how much something is a little misrepresented. I don't know if it's always intentional. But the credibility is sort of lost for the practitioner when that happens. So make sure that you sort of get out in front of things and do it honestly.

I thought -- Joslyn is here. She thought that -- she said this is a very personal preference, but I love references to articles, statistics, what other states are doing, particularly if we're looking at a big shift. And she offered a really interesting insight about when you cite to an important video or something in the record and maybe if there's a hyperlink or even a cite to something in the record, don't be afraid to do it more than once. Because if you're on page 32, and it was cited on page 10, she's like I hate when I have to go back and scroll and find that again. So, don't be afraid to re-cite something. I thought that was very helpful information for all of you.

And I think there was sort of explaining -- and this is what Judge Yates sort of talked about -- explaining how the law in an area works. Typically

that's something a little complicated and technical. It's great when we have a little background before you dive in. I know that is a normal or argument, facts, law, application. Don't be afraid to maybe swap that order a little bit. If something is complicated where you give us some background on what the law is, particularly if it's going to be something new to us or something we don't look at a lot. I think that helps. So those are mine.

MR. QUIGG: So, John, we've heard a little bit about what makes the court happy when they read a brief. How about from a practitioner's opinion. When you get an opinion, what are the top three things that make you smile?

MR. BURSCH: Number one is when I win. But leaving that aside, first, I want clear, crisp, interesting pros that's not too casual. There are so many judicial opinions that I think man, if I have to read that more than one, I might e want to poke my eyes out. But there is also on the other side of that. Sometimes some judges try to be too colloquial.

I was reading a first circuit opinion this week, and it just felt like someone was talking to people in the backyard. It didn't feel legal and professional. So I would encourage our judges and

justices to look to Chief Justice Roberts and Justice Kagen on the supreme court. I think they both strike the right balance between talking colloquial about things, but not doing it in an informal way. I think they just write beautifully. And I think some judges on our bench do too as well.

Secondly, I want to see unambiguous remand instructions. Far too often you get back to the trial court and there is questions about the scope of the remand. Is there an issue that is still left open. Maybe it's not. What is the trial judge supposed to do. I think the trial judges certainly would appreciate that clear direction. And then like we heard, part of that is on us as attorneys, on the front end we're saying exactly what relief that we want. But it's the bench's responsibility too to then take that and translate that in some kind of clear instruction.

And the third thing that makes me smile is just to see that an opinion is published, especially at the court of appeals. There is that funny court rule that says you have to explain any time that you cite an unpublished opinion. And I'm tempted to just put in a footnote because you published very few opinions. Everything that you do is unpublished. Of

course we're going to cite unpublished opinions.

If an opinion is worth putting out in the public and deciding a case, I think more often than not it should be published. Maybe there are true one-offs. But I think we need precedent. We need to be able to rely on decisions. And the problem when

you have 90 percent plus unpublished opinions is a case that I experienced recently where there was an opinion that was literally exactly on point. That the parties on one side were the same. It involved the same contract. The question was whether there was an arbitration clause that could be enforced. Everything was exactly the same. And because the opinion was unpublished, the trial court just decided to ignore it and ordered parties to arbitration, even though the court of appeals had done the exact opposite in this other case seven years earlier. It was an easy case to win on appeal instead of wasting everybody's time and money. So, publish more opinions. Those are the three things that made me smile.

MR. RILEY: So we've heard the things that the panel likes. The opposite of that is things that you don't like. Justice Welch, let's start with you. What are the top couple of things that you don't like to see.

MS. WELCH: So, I already talked about the stripping of the hyperbole. Obviously, if there's hyperbole in there, I feel like it diminishes the argument. I think sometimes there's pot shots at prior opinions of the court, whether it's way before my time, or during my time. It doesn't matter. That's usually not super helpful. Even if it's like an opinion that I personally didn't love. You know, it doesn't matter. There is just, I would hope, a respect for the bench that we just wouldn't do that.

Again, making sure you're being honest in the record. We certainly have seen areas where something gets misrepresented. Again, I'm not sure it's always intentional. As litigants we're so emersed in it. But if you're stretching things a little, it's going to be a problem on our end. And most likely we're going to catch it.

I do think there was an interesting feedback from, again, Joslyn, one of my clerks. She noted that recently she's noticing that there has been an effort to protect documents where they can't be copied or searched. And I understand there is reasons for this. But, again, we're digging into records and maybe searching for something specific to verify something, when it's really hard to do and someone is

having to click through 300 pages, I don't know, they might give up. So just something to be aware of. Having systems in place to make it easy for us, as

easy as possible, given the volume of work.
The other thing is we obviously in the supreme court in our orders, we have an order that goes out. And we ask questions in a certain order. Obviously you don't have to follow the order, but it's actually helpful if you do. Just knowing -- like quite honestly, when the Justices get to the table and we like literally go through the issues in order. So it's helpful when they are presented in a logical order that we can follow.
Sometimes arguments sort of ping pong and they get conflated. I know sometimes the issues are conflated. I know sometimes we don't always ask the best questions in the most artful manner. And then we do realize later that we did not ask that well. So we also, on the front end, are taking an initial look. And then on the back end are spending so much time realizing we could have asked it better. But to the extent you can follow the questions asked, that would be helpful.
MR. RILEY: Judge Yates.
MR. YATES: My greatest pet peeve is

endless fact sections. I never understand why somebody needs to take 35 or 40 pages to explain the facts of the case. My first boss, Judge James Churchill, said every case essentially comes down to one question of law or one question of fact. And the trick is to figure out what that is and get the lawyers to focus on that. If you're already up on appeal, and it's taking you 35 pages to explain the facts, you've missed the thread of the case.
My second pet peeve is over reliance of footnotes. I'm a footnote enjoyer. I put them in opinions for sides occasionally to say something clever. But there is nothing more frustrating than to have to read a footnote that goes on for two or three pages, and then another one, and another one, and another one. Footnotes should be few and as short as possible.
And then finally, I really dislike overreliance on unpublished opinions. I get the point that we have a huge body of unpublished opinions. And I too think that that can be frustrating for all of you. I mean, several times I've run across instances where we've said something five times in unpublished opinions, but we've never said it in a published opinion. For my part, when that happens, I try my

best to then write a published opinion. We've said this five times before. Why don't we say it now for binding precedence.

But it is difficult for us to wrestle with all of these unpublished opinions we're supposed to fight through. And I'll read them all if you cite them. But it does make preparing a little bit more challenging.

MR. RILEY: Dan.

MR. BRUBAKER: Top three from commissioners, number one, briefs that are extremely repetitive and unnecessarily lengthy. And especially those convoluted questions presented that are just very, very long run-on sentences.

Two, exaggerated or embellished language. Yes, if you're in our court, you need to say like why your case is important. Not just to the parties, but to the state's jurisprudence. But no you don't need to say that if we don't jump in, the legal system will collapse.

Third, just factual claims that don't have a citation to the record. Because that makes us have to -- we question it and then we have to poke around the record until we can either support it or not.

MS. WELCH: And I just wanted to actually

-- because these folks all touched on it, but you guys can't imagine how much time we spend debating this. Like we might have a majority on the merits. But often things break down with what do we do afterwards. Is it going back to the court of appeals. Does it have to go back to the trial court. Do we retain jurisdiction. Like there's robust discussions about that very last step, and we sort of have to decide what we do.

MR. QUIGG: So now, John, how about from the practitioner's perspective on opinions, what are your top three dislikes?

MR. BURSCH: Number one is ignoring arguments that the parties clearly raised. And that's a problem because the lawyer raised them because they thought that they were worthy. But the client knows there they are in there. And there is nothing more difficult than to go back to a client and say well we lost. This is what they said. And they said well what about my argument on this and on this, and they say well, they just don't address that anywhere in the opinion. It's a really hard conversation to have. So even if the bench thinks that an issue is not worthy of attention, at least give it a couple of paragraphs, so we can explain to our clients why they lost on that

issue.
Second -- and I think these are going in ascending order of irritation -- deciding issues the parties didn't raise. I hear all the appellate lawyers groaning. Sometimes the bench thinks that it knows more than the lawyers who are litigating the case. And that may be true. But there may be strategic reasons why someone didn't raise something. It may have been a conscience choice. There may be, you know, elements of that issue that would have been flushed out if it had been presented. But to decide that issue sua sponte, and not give the parties an opportunity to address it, is really overstepping the judicial role. And the supreme court actually wrote an opinion about this, striking down a ninth circuit opinion where the ninth circuit panel decided to litigate a case that they wanted to decide, instead of the case that the parties had actually litigated in the district court. So that's a no, no. And if you're going to reach our and do something different than the parties haven't discussed, at least give an opportunity for supplemental briefing so that it can be fully vetted.
The third thing is when an opinion criticizes counsel when it's not warranted. I think

there are very few cases where the litigation advocacy is so bad that a lawyer should be called out publicly in the opinion, instead of a more private way.
And I think back specifically to a sixth circuit opinion when I was working as solicitor general in the attorney general's office. And it was an environmental case and we had a lawyer who had been practicing for 30 years. He was a legend in the office. He would never raise an argument that wasn't frivolous. But representing the state, sometimes you have to make arguments that are tough. And a sixth circuit panel ruled against him. And a really good judge, who I respect, totally called him out on the carpet for raising kitchen-sink arguments and said some really unkind things about his advocacy. And that was just totally unfair. He was doing his job the best that he could. It was an unnecessary pot shot. So as lawyers we should not be taking pot shots at opposing counsel. We shouldn't be taking pot shots at previous opinions. And we'd ask that the judges and justices not take pot shots at lawyers who they're working with.
MR. RILEY: Thanks, John. So pivoting a little bit, one of the hot topics of our times is of

course artificial intelligence. Let's start with

Justice Welch and Judge Yates. Are you seeing instances, research or writing that you can identify as being based on artificial intelligence?

MS. WELCH: So, I have not seen anything yet that I know is -- I am sure some of it is in there. Most of you know we had our every-other-year bench conference where all the judges in the state were all together just last week. And the whole thing was focused on generative AI, and the tools, and all the things. So it's here. It's in our courtrooms. I have not seen anything directly that has come in. But it's a new tool. So I think it's there. It's just not obvious.

MR. YATES: I have seen some of it, and I have to confess. It actually makes me happy in the context in which it's used. We get all sort of in pro per filings. And when they're handwritten -- for some reason, the people who are in pro per can't write legibly to start with. So you can't even read what they're trying to say. But most of what they say makes no sense at all. We're starting to see some in pro per filings that are suspiciously similar to AI. But I'm okay with that because at least I can understand what they're saying.

So, for attorneys obviously you know all

the red flags. You know what you have to watch out for. I mean obviously go back and check your citations because the AI gen pods are notorious for hallucinating citations. But anything that produces a better brief, in my view, is something welcome and I'm not afraid of it.

MS. WELCH: It's here. I think we have to embrace it. One of the speakers last week shared an example of drafting a complaint. I think they were just using ChatGPT. And it was like someone having a landlord issue. Maybe getting evicted or something. And what do I do. And like asked ChatGPT. And you could file a lawsuit. Well, where do you live. Washtenaw county. Oh, which district court. And it got all the way down and it drafted a full complaint pretty darn well. So, I do think for particularly our in pro per folks, and sort of that I'll call it district court level, I think it's going to be a huge change. I think we're going to have more lawsuits frankly. So, there is job security. I do.

I think someone like John, who handles a

lot of appeals, he is probably going to be able to handle more appeals. I think more people are going to want to appeal. So I think that is the shift, is there's going to be more accessibility to filing

lawsuits.

MR. QUIGG: And Justice Welch, I'm with you. Gen AI is here. But what we're seeing from a variety of courts around the country, either local rules or standing orders, trying to put guardrails around use, either requiring disclosures or barring use, is that something that's been talked about?

MS. WELCH: So, we've had some initial discussions, like a few years ago when this was sort of new. And it's interesting. I was pretty new to the bench. It was right post Covid. And there was a lovely amazing conference at NYU for new appellate judges, federal and state, every year. And I went. And the discussion was brand-new. It was just starting. And I cannot tell you how many judges said well I'm just not going to allow it in my courtroom. And I was like it's in your courtroom. Like are you going to ban West Law. So, I was like we're already using it every day on our phones or whatever. So I think there is a lack of understanding by some folks. I think it's a judge's duty, just like attorneys, ethically it's our job to stay up on the best way to serve our clients and to serve the state. So, I am not -- yeah, I am not in favor of some rule because I think our ethics rules already cover it. So obviously

you can't file briefs that have fake sites. You can't do that now.

The speaker, one of the speakers last week, and these are legal scholars who spend lots of time thinking about ethics and AI together, we had a lot of those fantastic speakers last week, talked about the quality that comes from like Gen AI is probably equivalent to a summer clerk. And do you not use a summer clerk to help you do a first draft or pull in an argument that you're going to insert in your motion for summary. Of course you use your clerk. You still have to check their work because sometimes it's not quite right.

MR. RILEY: John, from a practitioner's standpoint, how do you think about AI or incorporate it into your practice?

MR. BURSCH: Well, everybody in the room has an interest in appellate practice. And hopefully

you think about yourself as a bit of an artist. At least I do when I'm doing an appeal brief. So when I think about AI, I think about my son, who is an architect. And something that he learned about in architecture school is that you look at precedence. You look at other buildings. And sometimes you borrow ideas and things from those, especially if you're

building a building and you want it to fit in with the surrounding buildings. You look at the precedence that happen to be on the block surrounding that. And I look at AI as looking at the precedence for a brief that I'm writing. It can be helpful to just do some basic research, if I don't have someone else who can do it for me. It might be helpful to generate ideas, themes that I can then use. But I would never rely on it to write a whole brief. I would only use it as precedence to help me in my own writing.

To just give you one example, the U.S. supreme court case I argued at the beginning of April, I was struggling with the opening two minutes of the argument, which is uninterrupted. And so I did use AI to just give me some idea generation. I asked it to draft five different opening statements for that argument based on the issues we were dealing with. And I didn't actually end up using any of those. But it got my creative juices flowing, and I was able to take that and come up with an opening that I really liked. So I think there is a lot of value in AI as long as we don't look at it as a human person that can replicate what we do. It certainly isn't.

One thing not related to the brief writing that I'll just mention, I heard recently -- I haven't

tried this yet -- that someone invented an AI program where you can upload judges or justices previous argument videos and their opinions, and then upload the briefs of your case, and it will actually -- and the moot experience is almost as good as having actual live lawyers there.

Again, I would not rely solely on a computer to moot me. But that gives you a sense of another tool that you might use if you don't have the resources to hire five people to replicate your Michigan supreme court panel before you do a moot. And I haven't tried this yet, but I've been thinking about it since I heard about this software about sticking a draft brief. This would have to be a closed AI, not a ChatGPT, because there's

confidentiality concerns. But if I had my own server where I could do this. And then have AI generate criticisms of the brief that I would write. What are the counter arguments that could be made, the objections to the things that I'm saying. And that will allow me to anticipate more and write a better brief myself.

So I think AI can be extremely useful. I think five years from now everybody in this room will have to be an expert on how to do AI prompts. But

that if we do that well, our work product will be even better five years from now than it is today.

MR. QUIGG: Now to Dan, you know, also on the topic of AI and how we might leverage it to make our jobs easier. The commissioner's office reviews thousands of briefs each year. Do you see a place for AI in that process, Dan?

MR. BRUBAKER: Yeah. Let me jump back one second to the last question and note that the Michigan Judicial Council does have an AI work group. And they, like Justice Welch, they were of the opinion that existing rules are sufficient to handle the legal and ethical question at this point. In terms of AI in our office, I've played around with it a little bit. Like when we get -- I'm not encouraging you to file them, but when we get emergency cases where somebody says I need to know -- we need something in two weeks because some horrible thing is going to happen, what I do is I look at it. I try to figure out if the deadlines are real. I then go to the chief justice and I say here's when I think you can get a report out. Here's how I think you can handle the voting. And we work together. And then I go back to the senior clerks and let the senior clerks know this case has been filed. Here's the application. In

consultation with the chief justice, here's how we're going to handle this.

So what I've been doing the last couple of times is just running the pleadings through an AI program that will summarize them. And I attach that when I send it to the senior clerks, with the caveat that this is totally an AI generated result. I'm not vouching for it. But it's kind of helpful to have a couple pages that just describe the issue.

In terms of our office going forward, I think we'll probably be using AI in a couple of respects. One is for research. For the moment we are

allowed to use co-counsel on West Law. And so that helps with not just summarizing documents, but also it helps you -- it helps identify issues and pull up cases and do some research on those. So we're kind of playing around with that.

The other thing that we're doing -- if you think of a job of a commissioner, a lot of it is summarizing. So we're working with some vendors and looking at programs that would generate like first drafts of -- we've got the analysis section. I mean that's what the commissioners, that's their bread and butter. But a program where you could put in everything, including the record, and have it generate

like facts and proceedings. Here are the issues in dispute. Here's what the appellate says. Here's what the appellee says. Here's what the court of appeals says. Something like that I think would be a useful jumping off point. But again, everything would have to be double checked. And kind of like an intern analogy, I would say right now -- if you have a really good intern, it saves you a lot of time. If you have a bad intern, it costs you time. We're kind of in the middle there. I don't think we're quite at the point where you can say this program is going to save us a lot of time. And then I think it becomes a discussion with the justices on how do you feel about commissioner reports that are partially AI generated. But I think it's out there and I think it's coming.

MR. BURSCH: Another suggestion for brief writing, if you're dealing with large amounts of material, like 300 pages, you can upload that into an AI program and have it do things for you. So, for example, we had a U.S. supreme court case. And the question was whether 1 of 87 subdivisions was so clear and ambiguous that it created a right that was enforceable under section 1983. And we wanted to show that if the lower court ruling was affirmed, that all kinds of other provisions of that same statute would

also be enforceable and the federal courts would be flooded with these cases. And so we actually put this lengthy statute into AI and said find ten other provisions that are similar to the one that we're litigating. And it did a pretty good job identifying what those were. Obviously we had to take it and talk about those and make sure everything was accurate. But as a tool to take a large amount of information, and then hone in on some needles in a haystack really

quickly, it was really effective.
MR. RILEY: So Justice Welch, Judge Yates, we talked a little bit about incorporating AI into the work that the Court is reviewing. How do you think about the potential for AI in the Court's work product being your opinions?
MS. WELCH: So, I suspect it's going to help sort with that first draft idea. I mean, I'm pretty involved with my opinions and, you know, I work closely with my clerks on those. But I do think it will be helpful in that regard.
Right now, the way I see it, the way I see it, I see it a little more on the front end. And by the time we get to the opinion stage, probably a lot of the work will have been done. And as I tell people, AI is going to help lots of people. I think,

in particular, our court of appeals with the volume of work their research division and all of that has, it's a stunning amount of work. I don't think people realize the amount of work they crank out. But I still have to, like when I prepare for oral arguments, I still have to like digest it. I can certainly see, for oral argument prep, I can see it helping with that effort. But I still have to distill it. And then ultimately, with the opinion writing stage, I suspect it will help with portions. Maybe a fact section or something, I can see it really helping. No, no, make it shorter. So, I think there are places it will help. I think we are still going to have a heavy handle ultimately in the final work product.
I certainly don't want it where, you know, judges are just generating opinions using generative AI. I think it's a tool, like West Law or anything else.
MR. YATES: I'll always rely primarily on LCI, law clerk intelligence. So the benefit that we have in the court of appeals, as Justice Welch explained, everything comes through the research division in the first instance. And they are well versed in the precedent of the court. And then when it comes through there, most of my opinion -- most of

my opinions run through one of my law clerks. And I have two phenomenal law clerks.
Some of you may not know this, but we're now able to go to a two law clerk structure. And I happen to have two phenomenal ones. Both of whom practiced extensively before they came to the research

division, and then went through the research division and came to me. One of them has argued cases in the Michigan supreme court already. So they know what they're doing. And then I'm, of course, notorious for tearing apart everything that I get, and re-writing it completely. When I get somebody on what is called a mini clerkship, my law clerks always warn the person he's not going to use anything that you give him verbatim, so please don't be offended if you don't have a single sentence that you can identify from what you wrote.

But I can't imagine inserting AI into the middle of that process. I can imagine using it at the front end because I am fascinated by this notion that we can feed in a gigantic case and get a pod cast to listen to. I can't tell you how much easier it would be to read briefs, in a complicated area of the law, if I've been given this sort of 30 minute introduction to the subject. So don't be surprised if I try that.

That sounds really intriguing.

MS. WELCH: Ditto, yeah.

MR. QUIGG: So now we're going to start with a question for all of you. We're going to move to the subject of briefs. There seems to be an emphasis, at least in some circles, on simplifying legal language to make it more accessible to a broader audience, a non-lawyer audience. And as lawyers yourselves, how do each of you think about language and briefs? Should we try to be a little more plain spoken? Or stick with formality in the past? Why don't we start with John and go down the line.

MR. BURSCH: I think that the briefs should reflect that same style that I want to see in judges and justices opinions. I think it needs to be conversational but not too casual. It needs to be clear and short. But mostly what I see when I see appellate briefs are briefs that are too long, too turgid, and not fun to read. If I pick up a brief, I want to read it like I read Les Miserables with 1,200 pages that you can't put down because it's so good. So I don't want it to be over casual. It needs to be professional. But I appreciate a less formal style.

MS. WELCH: I think I'm in the same boat as John. I hope my opinions -- I hope they're readable.

I hope they've gotten better since I joined the bench. There is sort of a period of growth. I am a big believer in sentences being broken up, paragraph

breaks, anything to make it easier for the reader. It sounds so logical, but it's amazing how much stuff we get that doesn't have that. I do try to, in my final read-through, I really try to put eyes on it to say okay, it's a tax case. Somebody who doesn't practice tax law, which is most people, whether they're attorneys or, you know, just lay people, can they read this case. They probably aren't going to. They're probably going to read our syllabus. But can they read it. Does it tell a story. But you still need professionalism. My personal style is strip out legalese. Hopefully make it readable, but still a legal document. So I tend to agree with John on the approach he prefers.

MR. YATES: This is the toughest balance you have to strike. Because I agree completely with what everybody else has said. But it's so hard to find that sweet spot. Far be it for me to criticize anybody for trying to inject some humor or something clever into an opinion.

You can go back and read my 600 plus business court opinions and you'll see that I'm a

generous user of that sort of thing. But first of all, you have to understand the context. I once got a draft from somebody that was making light of the facts in a CSC case. And I said never, ever, ever in a case like that. Never in a termination of parental rights. In commercial cases -- and I don't mean to suggest they're not incredibly important, but it's not the sort of fraught emotional situation where humor has absolutely no place.

No, if you can write a brief that is fun to read, that's a huge benefit to you. The only thing I would suggest -- and I am a practitioner of this myself -- before I use something that I think might be a little edgy or an inappropriate injection of humor, I'll have both my law clerks and my wife take a look at it. And any one of the three of them has veto power. And a couple times they've said that's not something you should say. Okay fine, it comes out. But you really need to run that by people before you submit anything that you -- you may think it's clever, and it might strike exactly the wrong cord with the court.

MR. BRUBAKER: I would say if it's a highly technical subject, I don't like technical language in a brief. I mean there are some areas of the law where

you just can't avoid getting technical. But I agree with everyone else. If it's not that, then you got to find a sweet spot between I just graduated from law school and I'm going to use every word I learned in law school in this brief, and I'm talking to my fishing buddy at a barbecue. Somewhere in the middle there.

MS. WELCH: And I would say too we do sometimes have to politely battle with our reporter's office. Because they have grammar rules that they're abiding by, and maybe we're pushing the limits a little bit.

I was sharing with some folks yesterday I had several cases involving statutes of limitations and tolling. And the reporter's office wants me to call it a statutory limitations period or something. And I'm like nobody talks that way. We call it the statute of limitations. So we do have that sort of reality. And I know they're just doing their job. But we do push back. And we have changed the rules, you know. Like some of us start sentences with but now. And that was like not allowed, right. We grew up that that was absolutely not allowed.

MR. RILEY: So John, you introduced the topic about brief length. So, we're lawyers. We're

given an opportunity to write a speech. So some courts implemented rules shortening brief length. How does the panel feel about the volume of information both from a judge's perspective and from a practitioner's perspective in terms of the length of the opinions.

MR. QUIGG: Why don't we start with Justice Welch.

MS. WELCH: Sure. So we have word limits right you. I did get some feedback yesterday that our circuit courts still have page limits. So we'll look into that. I think it's fine. I think the limits are fine right now, 16,000 words. You can obviously ask for permission to file something longer. And I think it's the rare case, it might be appropriate where it's highly technical or something. Although Amicus often helps out in those situations. I think it's about at the right length. I mean, I think most of you know less is more. We do a lot of reading. If you have a really strong legal argument, make it. The shorter and pickier you can be, the more helpful to us. So I feel like the length is about right. And then, you know, you can ask permission to do more if you need to, and tell us why. So I'm good with where it is, but I'm curious with what John thinks.

MR. BURSCH: Well, speaking for myself, not on behalf of the Bar, I think 16,000 words is too many. I've never read a 16,000 word brief and thought wow, they really used all of that well.

The U.S. supreme court has a 13,000 word merits brief limit. Many circuits now have dropped from 14,000 to 13,000. Lawyers don't like that because it forces us to work a lot harder. There is that law that's been attributed to Abraham Lincoln and Benjamin Franklin, I apologize for writing such a long letter. I didn't have time to write a shorter one. But there is so much truth to that. And we write better briefs under work constraints.

Now, sometimes it can be too short. In the eastern district of Michigan, there's a five page limit on reply briefs. That's ridiculous. But I think 13,000 words is adequate for a supreme court merits brief, it should be adequate for just about any merits brief. And 3,000 words for a supreme court merits reply brief I think is probably about right too. So, I would not be disappointed to see shorter limits.

MR. QUIGG: Judge Yates, how about you?

MR. YATES: I think you should always endeavor to file the shortest brief that you can. If

you have a 50 page limit, and you're writing 50 pages every single time, and you're trying to play with the margins just to make it fit, you're doing something terribly wrong. I always would go over and go over and go over briefs when I wrote them. And almost, invariably, they come out somewhere in the range of 20 to 25 pages. I just don't see the need to write over-long briefs. But I wouldn't want to place unnecessary restrictions on length because there are few cases where you really do need all those pages. They're very few and far between. But I would hate to restrict the attorneys in the case where you really do need something like that.

MR. QUIGG: And then Dan, from the commissioner's perspective, I'm assuming you're looking for longer briefs, right?

MR. BRUBAKER: As long as possible, please. No, I mean shorter is always good for us. The rule that we apply in the commissioner's office, in doing our own reports, is we want to give the justices absolutely everything they need to decide the case, and nothing more. And I think that's a good rule for briefing too. Give the Court everything it needs, but nothing more. And don't be repetitive. So I think

the shorter word limitations are fine.

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MS. WELCH: And I also want to make a comment about Amicus. It is wildly helpful, particularly in complicated cases where it's a new issue or we don't -- you know, we're not experienced on everything and understanding impact and all of that. But an Amicus brief that just directly repeats a party's argument, you really don't need to do that. You can file a piece of paper that says we agree. We support them. You can do. And that's helpful. So just a word of wisdom.

MR. RILEY: So Charlie had a really good idea of some sort of rapid-fire questions for the panel to address. And we've got about ten minutes left. So, I want to make sure we same some of that time for some audience questions at the time. But let's address some of these rapid-fire questions. We can do this with either thumbs up or thumbs down.

So the first one, do you support the cleaned-up parentheticals, alterations or omissions to a quote? Three yeses.

MR. YATES: I hate them. It's such an invitation for abuse.

MR. QUIGG: I appreciate the validation, Judge Yates.

MS. WELCH: AI will catch those.

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MR. QUIGG: From a thought perspective, mixed thoughts or all the same thought?

MS. WELCH: Okay, which is which?

MR. QUIGG: Are you pro mixed thoughts?

MS. WELCH: Too hard on the eyes.

MR. QUIGG: Judge Yates may have already given his signal on this, but footnotes, yay or nay?

MS. WELCH: Use them wisely.

MR. QUIGG: Introductions before the statement in the case?

MR. RILEY: Unanimous.

MR. RILEY: What punctuations do you particularly like or don't like, things like m-dashes, semicolons?

MS. WELCH: I'm pro m-dash. My clerks know that.

MR. YATES: Anything as long as it's used correctly is fine with me.

MR. BRUBAKER: Agree.

MR. QUIGG: What about bullet points, numbered lists, things of that nature?

MS. WELCH: I like bullet points.
MR. BURSCH: You and I are totally in alignment so far.
MR. RILEY: Inline headings versus centered

or set-off headings?
MS. WELCH: It just depends on how it looks on the eyes.
MR. YATES: Right. I don't have a preference, but centered is a little easier to follow. That's all.
MR. BRUBAKER: I agree.
MR. BURSCH: Left justified for me, for what it's worth.
MS. WELCH: I'm fully justified.
MR. BURSCH: Although fully justified text decreases reading comprehension by seven percent.
MS. WELCH: Is that true?
MR. BURSCH: Yes.
MS. WELCH: Did you just make that up?
MR. BURSCH: I did not make that up. Because the spacement changes between the words and the eyes can't read it the same way as when it's left justified.
MS. WELCH: I learned something today. That's fascinating.
MR. QUIGG: So now to something truly picky but something I still care about, one space after periods?
MR. YATES: Two.

MS. WELCH: It's two. I don't even know how you fix it. How do you not -- how does your brain -- I know, my clerks are one space. My brain can't even do it. And again, we have the luxury of reporter's who fix this stuff. But obviously, when you submit briefs, I really don't care.
MR. QUIGG: And then last, thumbs up or thumbs down, Times Two Roman.
MS. WELCH: It's used all the time. It's amazing how much I realize how much easier it is when I pull out a brief and I'm reading through, trying to get to a section, it is so much easier.
MR. BURSCH: Do you know the origin of Times Two Roman? It is from the London Times, the newspaper. And there was a paper shortage. And kind of like today, with the tariffs, the cost of paper was going up. And the London Times was looking for a way that they could fit more words on a page but use less

paper. And so that created the times font, which is crunched. It's harder to read.

MR. QUIGG: So we've got a couple minutes left. We want to open it up to questions. Charlie and I can travel with our mics. But we'd ask that you just keep the questions to generally the topics that we talked about today.

I see Mary with her hand up over there. I'll come to you, Mary. No problem.

MS. MASSARON: My question has to do with word limits. I'm comfortable with 14,000. I don't use it in many, many briefs. I hate to have it shorter, because then I'll have to file a motion every time I do get a case that's had three trials and been litigated and whatever. But I think that the reply brief word limit is too short. When you have the opportunity as the appellant to do a good thorough reply, you can respond to things that are newly raised. You can respond and help the clerk find places in their record where what is said is not entirely accurate, or is maybe taken out of context, or where you have a different view. And I wonder if the panel agrees that sometimes what they get in reply really doesn't answer all the points in the response brief and whether there is any interest in looking at expanding not -- I mean in the federal courts your reply is almost half the opening briefs. It's more words. At least I think the last time I looked at that. And to me, that works much better.

MS. WELCH: Yeah, I mean the Court is obviously always open to input from the Bar. We have an administrative process to look at this stuff. We

have a word count. You know, generally my colleague is like oh, we don't want to encourage longer briefs. But I think there are valid points made on a well-done reply. I do recognize it is short. I have seen though, because they are short, some really effective replies.

MR. YATES: I'm not a particular fan of reply briefs. Because I think the vast majority of them are totally useless. It's sort of like motion for reconsideration. There are a few motions for reconsideration that I see that are really dead-on right and used to change my mind once or twice a year in circuit court. My colleagues would tease me. They would say you just invite more motions for reconsideration. Why do you do this. Because

sometimes I admit I'm wrong. And sometimes, when you get a really good reply brief, it is tremendously valuable. The vast majority of reply briefs I see are just a regurgitation of exactly what we saw in the opening.

MS. WELCH: Yeah, I would say I think people feel like they have to file a reply because it's available. But really if you are just saying the arguments all over again, that is not helpful to us. But occasionally, to your point, maybe something was

misrepresented. Then yes, that is an important reply brief.

MR. YATES: And I'm sure John, for example, never wastes a reply brief. He files one if he has something to say that is necessary to reply to, otherwise he doesn't. I just caution people about long reply briefs. They're usually annoying, more than anything else.

AUDIENCE MEMBER: I have a statement and then a question. One of the problems with the long statements and questions presented actually comes from the tendency of the court of filing any tangent issue that was not covered in the -- that has forced me, for example, from moving from writing statements to questions that are one sentence long to ones that are multiple sentences long to avoid the claim that there is abandonment. My question, and I think you eluded to it, ten years ago we were hearing about the citational footnote and moving all citations to the footnotes because it made it easier to read when the text wasn't cluttered with footnotes. As we have moved to reading things on digital devices, is it not needed?

MS. WELCH: So, I can see your footnotes. I use Outlook 365. So when I open it, I look at page

view where I can see the footnotes easily. If I just open it without using that, I can't see footnotes at all. I have this with my colleagues, when we have opinions circulating. I have to open it in the app to see Judge Zahra's footnotes, or whatever they are.

It's interesting. I think the shift has been, because we are trying to use more plain language, and footnotes are very often jargony and lots of legalese. They don't have to be. You know, like the run-on string cites. You can make the point with 3. You don't need 20. I know for me, when I am reading, I do tend to find -- everybody is very

personal on this. So you can't caterer to every taste on the court of appeals and the supreme court. I always am like how should I read this. Should I read it ignoring the footnotes and go for a couple pages, three pages, and then circle back. Do I jump down. I mean, I still haven't figured out the best way. I find them distracting. I tend to prefer the cites up in the text. Obviously, if you're taking a little bit of a detour, like other states do this, and there is some parentheticals or whatever, then fine. But I personally prefer it up in the text. That's just me though.

MR. YATES: Completely agree.

MR. BURSCH: I prefer no citations in footnotes. And maybe one thought on the comment too, just to pass on to judges and justices, there's an enormous difference between issues and arguments. You waive issues. You never waive arguments. And if the courts would acknowledge that when you have a single sentence that asks -- you know, when someone's Freedom of Speech rights are violated, that that could encompass ten different arguments. And maybe they weren't presented below. That is okay. Arguments don't have to be preserved. Maybe they weren't in the question. That's okay. Arguments don't have to be preserved. So it's better that we do educating about the difference between those two things. We can maybe solve the problem of practitioners feeling like they have to have over-long questions, and judges and justices not appreciating those.

MS. WELCH: It's a totally fair point and one that we robustly debate at times.

MR. YATES: I completely agree with John on this. I think he's exactly right.

MR. QUIGG: Well, I know we have a few more questions in the room, but in the spirit of keeping us on schedule, I see it's 10:03, so I think we'll have to end the questions here. Let's give a round of

applause to our panel. Thanks so much everyone. Have a great morning.

(The excerpt of the bench bar conference was concluded at 10:03 a.m.)

CERTIFICATE OF REPORTER

STATE OF MICHIGAN)
) SS
COUNTY OF OAKLAND)

I, LAURA AMBRO, hereby certify that I reported stenographically the foregoing proceedings at the time and place hereinbefore set forth; that thereafter the same was reduced to computer transcription under my supervision; and that this is a full, true, complete and correct transcription of said proceedings.

LAURA AMBRO, CSR-5882
Notary Public,
Macomb County, Michigan.
My Commission expires: July 5, 2026

Tab F

Deposition Summary

Plenary - Supreme Court Practice Tips

Case name: Plenary - Supreme Court Practice Tips

Date: Friday, May 16, 2025

Witness:

Location: 44045 Five Mile Road, Plymouth, Michigan

Overall Summary

This appears to be a transcript of a panel discussion at the Michigan Appellate Bench Bar Conference, not a deposition. The discussion features Michigan Supreme Court Justices sharing insights about the Court's operations and providing guidance to attorneys on effective advocacy.

The Justices explain that they prioritize cases with jurisprudential significance, handling approximately 2,500 applications annually. They seek cases important to Michigan law, those affecting large populations, or requiring legal updates. The panel provides detailed guidance on what makes cases more or less likely to be accepted for review, with specific warnings against presenting too many issues without explaining their importance.

Regarding brief writing, the Justices unanimously oppose dramatic adjectives and emphasize the importance of clarity and honesty. They discuss their preferences for formatting elements and storytelling approaches, with special consideration given to accessibility concerns. The Justices outline their different judicial philosophies, ranging from strict textualism to purposivism, and share their views on various legal authorities and resources.

The panel provides extensive guidance on oral arguments, noting that Michigan provides initial uninterrupted speaking time which each Justice values for different reasons. They discuss effective practices, including showing appropriate passion and using brief case quotations, while condemning inappropriate behaviors such as incorrect citation of authority or sarcastic attacks. While Michigan has shorter time limits than the U.S. Supreme Court, the Justices emphasize they extend time when needed and value effective rebuttals.

The discussion concludes with Justice Zahra highlighting the legal profession's role in maintaining the rule of law and noting the Court's effective collaboration despite philosophical differences. The conference organizers invite attorneys to help plan the next conference in 2028.

Table of Sections

24:8–28:17	**Discussion of Legal Authorities and Sources**
29:4–31:2	**Brief Writing Best Practices**
31:3–34:5	**Oral Argument Opening Time and Structure**
34:6–37:10	**Oral Advocacy Do's and Don'ts**
37:14–43:23	**Effective Oral Argument Strategies and Purpose**
44:4–47:25	**Closing Remarks and Conference Conclusion**

Transcript Sections

Introduction and Conference Setup ↻	
At the Michigan Appellate Bench Bar Conference in Plymouth, moderator Mary Massaron leads a panel discussion with Michigan Supreme Court Justices. The session focuses on the Court's case handling procedures and ways advocates can improve their service to clients.	
1:1–1:22	The transcript is from Day 3 of the Michigan Appellate Bench Bar Conference on May 16, 2025, featuring Michigan Supreme Court Justices and a moderator from Plunkett Cooney
2:1–2:3	The panel discussion begins at 12:59 pm in Plymouth, Michigan
2:5–2:18	Moderator Mary Massaron introduces the session, focusing on how the Court handles cases and how advocates can better serve their clients

Criteria for Case Selection and Jurisprudential Significance ↻	
Michigan Supreme Court Justices emphasize they prioritize cases with jurisprudential significance over error correction, handling roughly 2,500 applications annually. The Justices seek cases important to Michigan, those affecting large populations, or requiring legal updates. They note that constitutional issues and repetitive legal questions can warrant review. Justice Thomas recommends following U.S. Supreme Court's concise petition style.	
3:7–3:14	Justice Zahra states he looks for jurisprudential significance rather than error correction, noting they handle about 2,500 applications and issue 35-40 opinions annually
3:15–4:1	Justice Zahra emphasizes cases should demonstrate importance to the state of Michigan and notes many applications fail to explain this importance
4:3–4:21	Justice Bernstein agrees about jurisprudential significance and adds they look for cases affecting large segments of people or requiring updates to existing case law
4:23–5:19	Justice Welch discusses how repetitive issues can become jurisprudentially significant, citing sentencing examples, and notes constitutional issues are particularly important
5:20–6:5	Justice Welch mentions that Justices' personal backgrounds and interests may influence their attention to certain cases

6:7–6:18	Justice Thomas, attending her first bench bar conference as a Justice, emphasizes the importance of attorneys explaining why cases have significant impact across their fields
6:13–6:21	Justice Thomas suggests following the U.S. Supreme Court practice of having concise cert petitions that focus on why cases matter

Common Problems with Applications ↻

The Justices discuss factors that make cases less likely to be accepted for review. Justice Thomas warns against presenting too many issues without explaining their importance. Justice Welch advises distinguishing arguments from Court of Appeals presentations. Justice Zahra cautions against factually intense cases with conflicting presentations and encourages Court of Appeals judges to use conflict panels rather than artificially distinguishing cases.

6:22–6:24	The moderator asks about factors that make a case "the kiss of death," such as too many issues or facts
7:1–7:8	Justice Thomas states that failing to explain an issue's importance and presenting too many issues are problematic
7:9–7:14	Justice Welch notes that arguments should be distinct from Court of Appeals presentations
7:15–8:13	Justice Bernstein emphasizes that while there's no real "kiss of death," cases need to stand out and be impactful
8:14–9:1	Justice Zahra identifies factually intense cases with conflicting presentations and excessive focus on Court of Appeals errors as problematic
9:2–9:18	Justice Zahra encourages Court of Appeals judges to call for conflict panels rather than trying to distinguish cases artificially

Issue Selection and Cross Appeals ↻

The Justices discuss strategies for presenting issues to the Court. Justice Welch notes important issues can be buried in applications and emphasizes the Court's interest in state constitutional arguments. Justice Zahra advises against relying on the Court to elevate buried issues and mentions they leave footnote hints about interesting issues. Justice Thomas recommends taking seriously when the Court indicates a case isn't a good vehicle.

9:19–10:14	The moderator raises the question of how many issues to present, citing other judges' preferences for fewer issues
10:15–11:5	Justice Welch acknowledges that sometimes important issues might be buried as fourth or minor issues in applications
11:6–11:15	Justice Zahra warns against relying on the Court to elevate buried issues, saying attorneys should know which issues are appropriate for the Court
11:16–12:2	Justice Zahra mentions the Court leaves footnote messages about interesting issues and suggests elevating jurisprudentially significant issues even if less important to the client

12:3–12:13	The moderator indicates they need to move on but has two remaining questions about leave applications
12:14–12:23	The moderator asks about areas where the Court has shown special interest and about cross appeals at the Supreme Court stage
12:24–13:5	Justice Zahra declines to specify hints he's dropped and says cross appeal advice depends on specific issues
13:6–13:18	Justice Welch discusses state constitutional issues and notes the Court's interest in seeing more developed arguments on state constitutional grounds
13:19–14:15	Justice Welch mentions the Court's writings on parental rights and discusses how issues can get trapped without cross appeals
14:16–15:3	Justice Thomas advises taking seriously when the Court writes that a case isn't a good vehicle and emphasizes working with trial lawyers to raise issues properly

Brief Writing Style and Format Preferences ↻

The justices discuss preferred writing styles for briefs, unanimously opposing dramatic adjectives. They have mixed views on block quotes, with some finding them occasionally useful. The panel addresses formatting elements like bullet points and tables, with Justice Bernstein noting accessibility concerns for blind persons. The Court generally prefers chronological storytelling in briefs.

15:4–15:16	The moderator transitions to briefing questions and begins a thumbs up/down exercise on writing attributes
15:17–15:25	The panel evaluates complete sentence point headings and using party names/ identifiers instead of procedural labels
16:1–16:8	The discussion moves to avoiding dramatic adjectives like "incredibly" and "amazingly"
16:3–16:9	The panel unanimously agrees on avoiding dramatic adjectives like "incredibly" and "amazingly"
16:10–16:25	The justices have mixed views on block quotations - Justice Thomas dislikes them, Justice Welch accepts short ones, Justice Zahra finds them sometimes useful
16:24–17:2	Justice Zahra notes that sometimes block quotes are so perfect he might use them in his dissents
17:5–17:14	The panel discusses using bullet points, lists, tables, and other visual elements in briefs, with Justice Bernstein noting these can be difficult for blind persons to process
17:19–17:23	Justice Bernstein explains that photos need descriptive text to be accessible
18:1–18:7	The moderator confirms the Court generally prefers chronological storytelling in briefs, with some exceptions

Judicial Philosophies and Interpretation Methods ↻

The justices outline their different judicial philosophies. Justice Zahra favors strict textual interpretation and canons of construction. Justice Bernstein advocates for a progressive, "living document" approach influenced by Justice Breyer. Justice Welch identifies as a purposivist, starting with text but considering other tools when needed. Justice Thomas emphasizes the importance of both text and context, particularly in specialized cases.	
18:12–18:24	The discussion turns to judicial methodologies and different approaches to decision-making, including text vs. purpose interpretation
19:16–20:3	Justice Zahra explains his judicial philosophy, saying he follows SCOTUS's interpretation methods for the U.S. Constitution and favors canons of construction
20:3–20:21	Justice Zahra emphasizes the importance of canons of construction and recommends lawyers use them in their arguments
20:24–21:8	Justice Bernstein begins explaining his more progressive judicial philosophy, influenced by Justice Breyer
21:9–21:13	Justice Bernstein emphasizes that while documents must be consulted, they need to be treated as "living and breathing"
21:14–21:21	Justice Bernstein explains that constitutional authors couldn't foresee modern technology and issues, so judges must try to do what's right
21:22–22:1	Justice Bernstein states that the law must make sense, as learned in law school
22:2–22:6	Justice Welch identifies herself as a purposevist, though acknowledging it's a difficult term to say
22:10–22:16	Justice Welch explains she starts with text but looks at other tools when text is unclear
22:17–22:23	Justice Welch notes she often includes paragraphs about intended purpose in opinions
23:5–23:20	Justice Welch discusses the TruGreen case as an example of battling interpretations over lawn seeds
23:21–24:7	Justice Thomas states that both text and purpose matter, and context is particularly important in certain cases like child welfare

Discussion of Legal Authorities and Sources ↻	
The justices discuss their varying perspectives on different legal authorities and resources. While all value Michigan Supreme Court precedent, they have mixed views on using U.S. Supreme Court precedent, law reviews, and ALRs. They generally find specialty treatises like Wright and Miller helpful, and express varying opinions on the usefulness of other states' law and ALI restatements for deciding Michigan cases.	
24:8–25:1	The moderator begins polling justices on various authorities, with all agreeing past Michigan Supreme Court precedent is important
25:2–25:8	The justices give mixed responses on using U.S. Supreme Court precedent for Michigan law questions

25:9–25:17	The justices discuss the value of law reviews, with mixed opinions ranging from negative to helpful
25:18–25:20	The panel discusses ALRs, AMJAR, and encyclopedias, with most indicating "it depends"
25:21–26:4	The discussion turns to specialty treatises, with positive responses for Wright and Miller's Federal Practice and Procedure
26:5	Justice Welch says Wright and Miller is helpful "most of the time"
26:6–26:8	Justice Zahra explains that if a rule seems clear but Wright and Miller suggests otherwise, it's worth investigating
26:10–26:16	The panel discusses surveys of other states' law, with mixed responses from the justices
26:17–26:20	Justice Welch explains that other states' approaches are helpful when considering changes to existing law
26:21–27:3	The panel discusses federal district court opinions, noting they are rarely used except when particularly persuasive
27:4–27:6	Justice Bernstein comments that these technical questions are useful
27:7–27:16	The moderator introduces discussion of ABA white papers and positions
27:17–27:18	The panel discusses ALI restatements of law, with mixed responses
27:19–28:2	Justice Zahra expresses skepticism about using out-of-state law professors to determine Michigan common law
28:3–28:8	Justice Welch argues that ALI restatements can be helpful resources for undecided issues
28:9–28:17	The moderator notes how different justices find different sources persuasive

Brief Writing Best Practices ↻

The justices provide guidance on brief writing. Justice Thomas emphasizes making supplemental briefs complete and clear, while Justice Welch warns against using hyperbole and stresses honesty. Justice Bernstein requests concise briefs due to his need to memorize materials. Justice Zahra agrees that overstating law or facts crosses an unacceptable line.

29:4–29:22	The discussion shifts to brief writing, with Justice Thomas advising on making supplemental briefs complete and clear
29:23–30:9	Justice Welch emphasizes avoiding hyperbole and being honest with the court
30:10–30:21	Justice Bernstein stresses the importance of concise briefs since he must memorize the material
30:22–31:2	Justice Zahra agrees with colleagues that overstating law or facts crosses a line that shouldn't be crossed

Oral Argument Opening Time and Structure ↻	
The Michigan Supreme Court provides initial uninterrupted speaking time during oral arguments, which the justices find valuable for different reasons. Justice Thomas appreciates attorneys addressing difficult issues upfront and encourages new litigants. Justice Bernstein uses this time to recall case preparation, while Justice Zahra values brief roadmaps of winning arguments. Justice Welch notes attorneys need not use all allotted time.	
31:3–31:12	The moderator introduces discussion about oral arguments and the Court's practice of giving uninterrupted speaking time
31:13–31:21	Justice Thomas appreciates seeing repeat litigants and encourages bringing in new litigants with proper moot court preparation
31:22–32:3	Justice Thomas values when lawyers address the hardest issues in their cases during opening minutes
32:4–32:16	Justice Welch says she likes the pre-question time as it helps her settle into each case
32:17–32:25	Justice Bernstein appreciates the fire-free time as it helps him catch up and recall his preparation
32:25–33:8	Justice Bernstein notes it can make sense to waive the time to let judges ask their questions
33:9–33:20	Justice Zahra finds it helpful when attorneys provide a brief roadmap of why they should win, especially later in the day's proceedings
33:21–34:5	Justice Welch adds that attorneys don't need to feel obligated to fill all their allotted time

Oral Advocacy Do's and Don'ts ↻	
The justices discuss David Frederick's book on oral advocacy, evaluating various practices. They approve of showing appropriate passion in significant cases and brief case quotations. The panel unanimously condemns incorrect citation of authority, questioning the Court, sarcastic attacks on opposing counsel, and displaying anger toward the Court. Appropriate humor is generally acceptable.	
34:6–34:13	The moderator introduces discussion of David Frederick's book on oral advocacy
34:14–34:23	The moderator shares her personal experience with pre-argument stress, relating to Frederick's description
34:24–35:3	The panel begins a thumbs up/down exercise about Frederick's advice on oral advocacy
35:7–35:9	The first point discusses whether to speak with too much passion and emotion
35:14–35:17	Justice Bernstein supports showing passion if you believe in your argument
35:18–35:22	Justice Zahra notes that while not every case demands passion, it can be acceptable for significant cases

36:1–36:3	Justice Welch says reading to the Court is acceptable when quoting briefly from a case
36:9–36:10	The panel unanimously agrees that citing authority incorrectly is unacceptable
36:11–36:12	Justice Bernstein indicates that asking questions of the Court is not good practice
36:13–36:21	The justices note they rarely see attorneys attacking opposing counsel with sarcasm in oral arguments
36:24–37:3	The panel discusses that showing anger or frustration with the Court is not helpful
37:4–37:10	The justices generally approve of appropriate humor in oral arguments

Effective Oral Argument Strategies and Purpose ↻

The justices discuss oral argument practices, emphasizing that while Michigan has shorter time limits than the Supreme Court, they extend time when needed. They value effective rebuttals that respond to opponents and address specific justice concerns. The panel affirms oral arguments' importance for both Court deliberation and public transparency, with Justice Bernstein particularly noting their value for clarification. Justice Thomas adds that arguments influence how opinions are written.

37:14–37:23	Justice Zahra commends the dedication of attorneys attending the conference to improve their appellate practice
38:9–38:13	Justice Welch emphasizes that arguments are available online and can be watched for learning purposes
38:15–38:25	Justice Welch notes that different attorneys can be persuasive with varying styles
39:1–39:6	Justice Thomas emphasizes the importance of understanding and addressing case weaknesses
39:9–39:16	Justice Zahra particularly appreciates when rebuttal is truly responsive to opponent's arguments rather than rehashing
39:17–39:24	Justice Welch praises attorneys who effectively address specific justice concerns during rebuttal
40:1–40:18	The moderator raises questions about oral argument time limits, noting the U.S. Supreme Court has expanded time while Michigan has shortened it
41:2–41:17	Justice Zahra explains that oral arguments are for the Court's benefit, and while they may set shorter times, they will extend them if needed for a "hot bench"
41:18–41:25	Justice Welch agrees that while times may seem pressed, the Court will hold attorneys longer if needed and usually allows them to finish their thoughts
42:6–42:10	Justice Welch notes that the Court has thoroughly prepared with the briefs beforehand and oral arguments serve both the Court and public transparency
42:13–42:19	Justice Welch mentions recent panel discussions about the necessity of oral arguments and data on how often they change minds

42:20–43:2	Justice Welch explains that justices sometimes use questions strategically to address colleagues' concerns or secure votes
43:3–43:16	Justice Bernstein expresses strong support for oral arguments, saying they particularly benefit him by allowing clarification of questions
43:17–43:23	Justice Thomas notes that oral arguments impact how cases are written, even if they don't change the outcome

Closing Remarks and Conference Conclusion ↻	
Justice Zahra emphasizes the legal profession's vital role in maintaining the rule of law, sharing his background as a child of Maltese immigrants and his judicial experience. He notes the Court's effective collaboration despite disagreements. The conference concludes with an invitation for attorneys to help plan the next conference in 2028, with planning to begin in early 2026.	
44:4–44:7	Justice Bernstein praises the conference organization and quality
44:8–44:21	Justice Zahra emphasizes the legal profession's essential role in American life and maintaining the rule of law
44:17–44:23	Justice Zahra shares personal background about his parents immigrating from Malta and his 30 years as a judge
45:4–45:11	Justice Zahra concludes by noting that despite disagreements, the Court works well together and helps develop Michigan law
45:12–45:16	An audience member thanks Justice Zahra and invites attendees to help plan the next conference in 2028
45:17	Justice Bernstein expresses surprise at the 2028 date
45:18–45:23	The audience member explains they need new planning committee members across all experience levels
45:24–46:9	Instructions are provided to email support@mabc.org to volunteer for conference planning, which will begin in early 2026
46:10–46:13	The conference concludes at 1:59 p.m.
46:14–46:25	The remainder of the transcript contains blank space
47:1–47:25	The transcript includes a Certificate of Reporter signed by Laura Ambro, CSR-5882, whose commission expires July 5, 2026

Transcript Text

↻ 1 MICHIGAN APPELLATE
2 BENCH BAR CONFERENCE
3 Day 3
4

In Re:
Plenary - Supreme Court Practice Tips
_____/

The Michigan Appellate Bench Bar Conference,
Taken at 44045 Five Mile Road,
Plymouth, Michigan,
Commencing at 12:59 p.m.,
Friday, May 16, 2025,
Before Laura Ambro, CSR-5882, US Legal Support

Panel:
Brian Zahra, Michigan Supreme Court
Richard Bernstein, Michigan Supreme Court
Elizabeth Welch, Michigan Supreme Court
Kimberly Thomas, Michigan Supreme Court
Moderator:
Mary Massaron, Plunkett Cooney

Plymouth, Michigan
Friday, May 16, 2025
12:59 p.m.

MS. MASSARON: It's a pleasure to be with you all and with the distinguished members of our supreme court. They've all been introduced to you at various sessions I'm sure. And consequently, I'm not going to spend time introducing them again. I'm sure that they will understand no disrespect is intended.

So we are trying to elicit from the Court their thoughts about how they handle our cases and what we can do better to serve our clients and communicating with the Court as advocates. And we don't have a lot of time. But I'm going to try to go through that process on briefing, oral arguments, some other questions with the Justices so that they can share their insights with you.

And starting with the question of applications for leave, one of the things that we do as appellate lawyers, is to evaluate whether to take a case to the Michigan supreme court. Is this a good case. You're not going to get what you want. You might get something worse than what you have. But there are many times when an application is prepared.

Making the evaluation is hard. It requires our

judgment. And I'm hoping the Justices can share their thoughts. And maybe we'll start with Justice Zahra, the senior member of the Court, but less senior than I am, telling us what makes a good issue and what makes a case that appeals to you.

MR. ZAHRA: So, I'm looking for jurisprudential significance. Not error correction. I'm not a man of error correction. But I'm sure you can probably do a search and find times where I went down that path. But I try to avoid that. And ultimately, with 2,500 apps or so coming through, that we're doing, I'm guessing, 50 orders and 35 to 40 opinions. We really should be limiting what we take up to those that are opinions that are most important to the state of Michigan. So it's not, as you say before, it's not really, you know, whether your client was wrong, but why is this important to the state of Michigan.

As you know, sometimes we never see the app. It starts with the commissioner. And that's what the commissioner is looking for. And they lay it out for us. On a number of occasions, actually asked for the applications. And I'm shocked how many times they don't lay out why this is such an important case

that we can should be taking it.

MS. MASSARON: Justice Bernstein.

MR. BERNSTEIN: Sure. You know, I don't have much more to add to that. But I think that's exactly right. Anything that has a jurisprudential significance. Something that is going to affect everybody, or have an impact on a large segment of people. And I think we really work at that to try to find the cases that are going to have the biggest impact. And I think also, you know, things change too. And, you know, we're looking at sometimes issues that are going to impact people. But ultimately, you know, there is certain case law that needs to be updated. There are certain opinions that need to be updated, or followed, or adhered to a little bit more. And I think we're just kind of in a combination of both those things, jurisprudential significance. And also sometimes, you know, certain facts or certain cases will present themselves in a way that it allows for us to codify decisions that we already made or overturn decisions, if necessary.

MS. MASSARON: Justice Welch.

MS. WELCH: Great. Thank you. So I agree with Justice Zahra, jurisprudentially significant. Sometimes we might agree on whether something is

jurisprudential significance. So, let me give you an example. Sentencing maybe. You know, scoring an OV or something. Sure, that one person, you could argue it's not jurisprudentially significant. But if we see it happening over and over and over, it's like huh, it starts to look more significant. So we have healthy debates about that at the conference table when we're trying to decide what cases to take.

For me, obviously if there is maybe a conflict that's been raised, or something about the court of appeals, there's some clashing in cases that aren't really too easy to harmonize. Those obviously get pushed up to us and are important for us to take a look at.

For me, anything that involves our constitution is usually pretty important. We're seeing more of those, although not as many as I expect we'll probably see in the future. So those are for me really big factors.

And then some of us have issues we care a lot about. I have spoken to this group before. I'm very interested in text. I come from an employment law background. So you do have maybe a little more attention to those cases. It doesn't mean we're going to accept them, because it's sort of a threshold. But

it might be that one of us has a personal interest from our background. It's something we care about. Maybe we know a lot about the issue. And something we bring to the table to talk more to our colleagues about.

MS. MASSARON: Okay. Justice Thomas.

MS. THOMAS: Well, first of all, I'm so excited to be here. My first bench bar on the bench. So thank you. I would say that, you know, one thing is to really remember that you are the experts in your fields and we are not. So really explaining to us why this has a significant impact across your field and being really explicit about that. There is a practice in the U.S. supreme court that maybe is really to an extreme having these very snappy cert petitions that really really hone in on these here's why it matters verses telling the court all about the case. And I enjoy learning about the case, but I think, you know, keeping that mindset. Why are the -- you know, very short and succinct way of understanding the importance of the case is really helpful.

MS. MASSARON: So, are there things that make a case the kiss of death? Too many issues? Too many facts?

MR. BERNSTEIN: That's a great question.

MS. THOMAS: I guess the kiss of death is the opposite of telling us why an issue is important. The kiss of death is well, there is not really much to see here. Or here is the scatter shot. I think too many issues is problematic. I know that there is debate on that point. But I think that if you really have -- you don't have ten issues of state-wide importance. So really honing those in.

MS. WELCH: Right. And for coming to our court, obviously very different than the court of appeals. So if it's going to look like a court of appeals argument, as opposed to honing in on those issues, that's going to be harder for us to take a look.

MR. BERNSTEIN: I think that for our court, you know, we take our job so seriously and we care about each and every case. I don't think there is really a kiss of death for any kind of particular case. I think it's the level of interest that the court is going to have. And I think, at the end of the day, you have to make your case something which is going to stand out. It's going to be impactfull. And I think that it ties back to the other question that we were just asked, which is, you know, the question as to what kind of things is the court looking for.

If we're not able to find something that's jurisprudentially significant, if we're not going to find that it's going to have an overarching impact, then I think the Court will tend to shy away from it. We tend to really focus on things that matter to the greatest amount of people. And I think that Brian said it really well when he said just the numbers of cases that get appealed to us, and the number of opinions that we actually issue, I think ultimately, I would say, that there is no one thing that's going to be a kiss of death. I think ultimately what it comes down to is we are going to prefer certain things over others.

MR. ZAHRA: I think the cases which are incredibly factually intense, when you are looking at both side's presentation of the facts, that there is things that don't overlap. That, to me, is suggestive that this case is probably not the right case to take up this issue.

And then the other kiss of death is just hammering over and over how the court of appeals got

it wrong. Well, that's not jurisprudentially significant. If the law is that clear that the court of appeals got it wrong, all you can possibly be hoping for is a preemptory reversal order. And we

don't do very many of those.

Let me just say one more thing to my court or appeals colleagues. When I sat on the court of appeals, we did two, maybe three conflict panels a year. I don't see so many conflict panels anymore. I see the court of appeals wanting to distinguish the other case. Sometimes bending, twisting, turning in all sorts of contortions, to show a distinction. So perhaps some of the newer judges who are here, don't be afraid to call for a conflict panel. If one earlier panel has made a rule of law, and you think it should go a different direction, call for a conflict panel and you'll have what we used to refer to it as a super panel to make a determination and it might end there. But when we see things -- when we're trying to determine whether there is truly a conflict or something that is distinguishable, that's not really helpful to us.

MS. MASSARON: In terms of framing the issue, you've already said too many issues is not a good thing. And I'm just trying to drill down a little. Justice Stellia (phonetic) used to talk about the group of threes, there is three in this, three in that, there should be three issues or less. Judge Alvazar (phonetic) said if you start with one issue, I

start off thinking before I read your brief that is a serious issue and I should give it studied consideration. To start off with ten, I start off thinking none of these are serious issues. You have nothing and you're just throwing everything you can, and that's not good for your case.

At the supreme court level, we're trying to get leave granted. I think the analysis has -- some of this applies. But it's a little bit different, because you're looking to issue an opinion on something of importance to the broader bar and state. I'm just wondering what your thoughts are in terms of omitting issues or raising issues that might bear on this question.

MS. WELCH: Sure. I can jump in. We had a discussion in our break-out yesterday. A little harder for those folks, you know, they're going to throw stuff in for a variety of reasons. And

sometimes there will be an application and it's like the fourth issue that we're interested in. So you just never know. And that fourth issue might actually be kind of minor to that defendant, but it's big for all defendants. So we'll maybe pull an issue out that we're interested in and deny all the rest, or not issue an order on the rest. So certainly to the

extent when things can be dwindled down, it does help. I mean, why are you -- getting back to that, why are you coming to the supreme court. Why does this matter for everybody. And clearly everything in the case is probably not going to matter to us.

MR. ZAHRA: Let me just respond. The problem with that approach is that you're relying on the Court or the commission's office to go down to the fourth issue and raise it up. You should be familiar enough with the area of law on which you're taking an appeal to know whether this is something that is meet to the Court. Even if it is a minor issue to your client, ultimately you want to get into the supreme court. So why put it forth. It might be ignored or missed altogether.

If you do have something that is clearly peculating in the Court, and we leave enough footnote messages about things that we find interesting.

Look, I'm not looking to go take more cases. But the fact of the matter is this Court does see enough cases, and what might be big down the road. So if you have it, even though it's not the number one thing for the client, you should probably elevate that up and move perhaps something more important to the client down a notch because you want to get in the

door. And when you move it down there, we may catch it, but probably not.

MS. MASSARON: So, we're going to have to move on to another part in a minute. I always have twice as many questions as we can get to.

MR. ZAHRA: Well, I really think you can be sitting here.

MS. MASSARON: I'm not on the Court.

MR. ZAHRA: I'm going to ask you a few questions.

MS. MASSARON: So, I have two more questions on leave app. And I'll ask them both and you can jump in as you see fit in responding. One of them is as you are talking about hints. Are there two or three areas that the Court has dropped hints or

that you're aware of where the Court has a special interest in looking at the law. That's one. And the second is sometimes there is a big debate between lawyers and clients about whether to bring a cross appeal when an appeal is pending, and what does that do to the case. I would be interested, I think everybody would, in your thoughts on cross appeals at the supreme court stage. Justice Zahra.

MR. ZAHRA: Well the hints I've dropped aren't going anywhere. There is no reason to point

those out.

And on the cross appeals, I really don't know what to tell you on that because it really is dependent on what the issues are. So I'm sorry I can't give you something more.

MS. WELCH: Yeah, the cross appeal thing is fascinating. I have written a fair amount on some issues where we talked about the importance of the state constitution and we have had cases where there is clearly nothing under the federal constitution and maybe you were denying those, or deciding them, and you say but nobody raised the state constitution. Might you want to take a look. We're seeing more of that happen, I think, because we've been doing that.

But again, a lot of times those arguments aren't very developed. So it's sort of thrown in sometimes, but still not quite really asking us to take a look at the state constitution.

And I'm sure Justice Thomas could comment more, but I think there is a lot of us who have written a fair amount on parental rights and process related to that.

As far as cross appeals, it is so interesting because we don't have very many of them. And it's interesting how an issue can kind of get

trapped unintentionally. I've seen this happen a couple of times where there was a decision, you know, maybe where a plaintiff may have prevailed at the trial court and then didn't appeal because they won. You know, the defendant side appeals, and maybe it gets reversed on a different issue. And then that issue ends up going up. And it gets kind of convoluted. So there are times that definitely that cross appeal could help. I think we actually hear about that issue. It's just happened a couple of times I can think of in particular where like an issue that trapped below and we're sort of stuck with that.

So I think there are times to think that through. Like what if the Court did this and is this issue -- do I need to do a cross appeal.

MS. THOMAS: Yeah, the only thing I would add -- and I agree with what's been said -- was to say that, you know, if there is writing saying this case isn't a good vehicle, you should take that at face value. It is something that we took the time to write to say this might be an important issue. It is something that we applaud about and are looking at. And then just to communicate to the trial bar to also raise those issues. So you might see all the issues out there. But if you're not working with and talking

to the trial lawyers to raise those in the first instance, then they're not going to come to us in a way that is suitable necessarily.

MS. MASSARON: So, we'll move on to the question of briefing. I will omit my questions which I ask regularly about what is the difference between a mini oral argument, merits, grants, and merits that are points, because of time. And as we start, I thought we would use a sort of low-tech way, which worked very low in a prior panel. I'm going to read a list of items, attributes of briefing. You could do a thumbs up, thumbs down, or if you're completely agnostic, you can move your thumb down.

MR. BERNSTEIN: How does the agnostic work?

MR. ZAHRA: Thumbs up, thumbs down, or flat palm.

MS. MASSARON: Writing point headings in complete sentences.

MR. BERNSTEIN: What was the result?

MR. ZAHRA: We like it. They're agnostic.

MS. MASSARON: Using party's names or an identifier like a company, the employee, the driver, the pedestrian, rather than plaintiff, defendant, appellant, appellee?

Two thumbs up, two agnostic. We have an

evenly split set of jurors today.

MR. ZAHRA: Am I dreaming?

MS. MASSARON: All right. So, avoiding adjectives like incredibly, amazingly, notably, ludicrously.

MS. WELCH: Yes if we're avoiding them?

MS. THOMAS: Thumbs up if we want to avoid?

MS. MASSARON: Yes. Everybody wants to omit those from our briefs.

Introducing block quotations by explaining how the quote supports your argument while refraining from too many or really, really long indented quotes. Thumbs up or down?

MS. WELCH: As long as they're not too long.

MS. MASSARON: Who was going to say they like block quotes?

MS. THOMAS: I do not like block quotes.

MS. WELCH: And I am fine with them if they're not too long.

MR. ZAHRA: Sometimes they're great.

MS. MASSARON: Yeah. Because they give you the whole discussion.

MR. ZAHRA: On occasion, we read it and what would I take out of it. There is nothing. I

might put it right into my decent. I'm practicing for my retirement job.

MR. BERNSTEIN: Everybody tip your waitresses. He'll be here all week too.

MS. MASSARON: Using bullet points, lists, tables, charts, photos, maps, other inserts into brief. I think this has come up in some of the earlier sessions.

MS. WELCH: I said earlier I liked it. I know Judge Yates does not. We talked about this earlier. And John Bursch agreed with me.

MR. BERNSTEIN: That makes it -- for a blind person, those types of things could be tougher to process.

MS. MASSARON: I'm glad you pointed that out, Justice Bernstein. I was thinking about the photos as I was looking at all of you and thinking well how is that going to help Justice Bernstein.

MR. BERNSTEIN: It's not. If you're doing a photo, you have to describe what it is. And just use descriptive terms, which isn't that hard. It's a photo of whatever it is. You just have to simply say whatever it is.

MR. ZAHRA: And it never takes a thousand words.

MS. MASSARON: I'm going to skip a few of these just because they came up in earlier sessions. Tell a story in chronological order, not going one by one through each person's testimony.

I think generally that has been -- with some hesitation for special cases -- I think that's a

fair reading of the Court.
Do not ignore the lower court opinions and why they are correct or wrong in your briefing.
MS. MASSARON: It's poorly worded. I'm sorry. I should have said the status.
Okay. So let's turn to judicial methodologies, precedent, and other technical legal points. The U.S. supreme court focused on judicial philosophy a lot, how it relates to the tools of judicial decision making, and one dispute -- you all know this -- is text versus purpose in interpreting statutes. Or some jurors exercise very decisive incremental decision making. Are more comfortable with balancing tests. Others really like -- Scallia was a prime example of this. Bright line tests. They don't like balancing. It gives too much discretion to the courts and makes it unstable. That would be his view. Others know the bright line test wouldn't.
And there are many other jurisprudential

debates that go on in the academic setting, in the legal setting, and in some fashion or another, in briefing. The question is, in a couple minutes this is really an unfair question, but what would you say --
MR. ZAHRA: I'm ready to turn the red light on.
MR. BERNSTEIN: Brian brought his A game today.
MS. MASSARON: How would you describe your judicial philosophy?
MR. ZAHRA: Thirty years Mary, and you're asking me?
MS. MASSARON: This is the kind of answers that when we get these questions at oral argument --
MR. ZAHRA: So, U.S. Constitution I'm following whatever method of interpretation that has been provided to me by SCOTAS. I think it is a fair reading. And this Court may change it in the near future, or over the course of time. But a fair reading is the U.S. Constitution there is plenty of case law to be interpreted as it was understood at the time it was enacted in the '63 constitution.
I am a big fan of cannons of construction because I want something to help me discern what a

statute means. And I recognize that the cannons are there to be weighed and used against each other. But it's all for the power of the reasoning. So I like

engaging sometimes with my colleagues over what cannons are appropriate. Sometimes they don't want to engage with me on that and are looking at it in a different way.

So for me though -- you know, Scallia Reading Law, it's a reading book. It's not a political book. Before there was Scallia Reading Law, there was, and there still is, Sutherland's Rules of Statutory Interpretation. And all these things are in it. They've been here for hundreds of years. They are useful tools of interpretation. And so, as lawyers, if you're trying to, you know, get a particular interpretation of the statutes, you really should be combing through these things and providing them. The Court may or may not find them useful. I probably will. But sometimes the court as a whole will find them useful and helpful in how we interpret the statute.

MS. MASSARON: Thank you so much. Justice Bernstein.

MR. BERNSTEIN: So I've always been a fan of Justice Briar. And I think that at the end of the

day, you know, it's similar to what Brian said. But my viewpoint is a little bit more progressive. It's the sense that in 1963, people didn't know all the complicated issues or technology, things that would change. So I just think this is your classic liberal versus conservative perspective. But I think a person like myself, who tends to be a little more liberal minded, I think basically feels like yes, look, you got to go to the document. You have to see what the document says. But at the end of the day, you have to kind of allow for it to be a living and breathing document. The idea is that not everything is the same as it was in 1963.

The folks when they did the state constitutional convention, or our original U.S. constitution, didn't really think about the type of technology that we were going to have and the type of issues that we were going to have. So at that point you have to try to do your best to do what's right, and hopefully apply it and look at the situation. Try to understand what Justice is.

And I think, at the end of the day, the law has to make sense. We learn that when we're in law school. It's a simple thing. The law has to make sense. And I think as long as the law makes sense,

you're usually on the right path.
MS. WELCH: So, I echo a lot of what Justice Bernstein just said. I'm pretty open about being a little more of a purposevist, or maybe a lot more of a purposevist, which is just a terrible word. It's hard to say.
MR. ZAHRA: Conservatives make that word.
MS. WELCH: That's fine.
MR. ZAHRA: You like it.
MS. WELCH: But, yeah, of course you start with text. But if the text is unclear or in context if it isn't directly what it says, then of course you have to look at other tools. And I certainly have no problems using some of the statutory jurisprudential tools that Justice Zahra referenced. My concern is when it gets used to sort of pigeon hole something -- so, my colleagues know this, when I'm on an opinion, it's going to be important to me that when we're doing they editing process, that there is probably a paragraph thrown in there that talks a little more about this is what it was intended to accomplish. And that's why this interpretation works. So I tend to do that a fair amount.
I also agree with Justice Bernstein that these documents were drafted to stand the test of

time. So, I do tend to think they are documents that can morph over time. The underlying principle is the same. But, of course, how we apply something is wildly different today than it was in 1963.
So I can't remember the timing, but between the last conference and this one, I think it came up after this conference, I hold up this funny little case called Tru Green, as an example. I know I think Shapiro wrote the affirmance maybe at the court of appeals. Came to us. And we had -- I wrote why the interpretation on things on the land did not basically cover lawn seeds. And Justice Viviano -- and so I held it up if students want to see an example of this opinion of two etiologies. I think Glacier maybe wrote it, and then Shapiro maybe wrote a concurrence.
So, it's a great little -- it's this little case. It's not like it's getting lots of play or anything. But it was a great battling of sort of the cannons and etiology over lawn seeds. Justice Viviano wrote one view and I wrote the other.
MS. THOMAS: So I'm new. So, I still think text and purpose matters. You know, you asked a question, which I think we haven't talked as much about about rules. So I think there context matters. We can't imagine a child welfare case that had a

bright line rule, right? That's going to be a balancing test about the factors there. And that's an appropriate thing to do in that context. And so, I think that's the context of the case and how it plays out in the lives of the litigants that, at large, is going to determine a lot of those, the answers to those questions.

MS. MASSARON: I think everyone found that very helpful. And I want to run through again, using the thumbs up, thumbs down, flat palm, a list of potential authorities. Sometimes we're trying to figure out how strongly the Court considers various authorities. And of course we know if it's a question of federal law, there is on point U.S. supreme court authority that's going to be controlling. But in the many cases where there are arguments to be made, I'll run through this list. And if you would say thumbs up if it's something you would strongly consider in a favorable way, that is things you should maybe adopt, or go with it, because the authority is one where you have a great deal of respect, or know, or it really depends. That's what I think our audience would love to hear from you. So past president from the Michigan supreme court?

Everybody says thumbs up, which certainly

makes sense.

Past president from the United States court when dealing with the Michigan law?

MS. WELCH: Neutral.

MS. THOMAS: Yes.

MR. ZAHRA: Neutral.

MR. BERNSTEIN: Yes.

MS. WELCH: It depends. Things change.

MS. MASSARON: Okay. Law reviews?

MR. ZAHRA: No.

MR. BERNSTEIN: Is feel.

MS. WELCH: Yes, it's a helpful tool.

MR. ZAHRA: It's a tool that could be helpful if you like the way it goes.

MS. WELCH: Well, maybe they're raising interesting legal theories or have information that's helpful. It explains it well, yeah.

MS. MASSARON: So, ALRs, AMJAR, other encyclopedias? Everybody is saying it depends.

MR. BERNSTEIN: It's helpful.

MS. MASSARON: Specialty treatises like Wright and Miller on Practice and Procedure, or Ravcoff's Law of Zoning, or Sutherland's volumes on statutory interpretation?

MR. ZAHRA: Those are wildly different.

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MS. MASSARON: Okay. Wright and Miller's Federal Practice and Procedure.
MR. ZAHRA: Yes.
MR. BERNSTEIN: Yes.
MS. WELCH: Most of the time.
MR. ZAHRA: If the rule seems to me to be clear, and Wright and Miller wants to tell me it's not, oh, they must have found something there.
MS. MASSARON: Thank you. I think that's how helpful to know. Okay. A survey of other state's law.
MS. WELCH: It depends on the issue.
MR. BERNSTEIN: What was the verdict?
MR. ZAHRA: I'm down. You're in the middle. Elizabeth is up. And Kim is in the middle.
MS. THOMAS: Yeah. It depends.
MS. WELCH: Yeah. If we're being asked to change something, it's helpful to know what others have done, like a different way of looking at something.
MS. MASSARON: A single federal district court opinion.
I guess if it's fabulously persuasive, maybe it's useful.
MS. WELCH: Yeah, we don't use them that

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often. Every once in a while they'll work their way in because they're applying Michigan law on something and it will work its way in.
MR. BERNSTEIN: These are great questions though. I really like them. They're very technical. So hopefully this is going to be useful.
MS. MASSARON: Okay. Two more, and then we'll move on. ABA white papers or positions? I mean, the places where you see them are maybe in federal court. But they have various documents about the lawyer's obligation to, in defending criminal defendants, and I don't practice in that area, but I've seen those used in federal cases when dealing with ineffective assistance of counsel, for example. Or there are white papers on judicial ethics, attorney ethics.
ALI restatements of the law?
One down and everybody else is mixed.
MR. ZAHRA: This is basically common law. It is supposed to be the policies, the practices, the law traditions of our state. Do I really need law

professors from New York, Florida, Arkansas, California telling me what Michigan common law should be. You know, whether I like the position they take or not, I just don't think it has any place in the

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highest court of a state determining what the state's common law is or how it should change.

MS. WELCH: And I think because we are deciding undecided issues often, that it's helpful to have that input. So it's another resource. It's not going to be the reason we decide something. But it is a resource. If you're looking at multiple reasons for an argument, I find it helpful.

MS. MASSARON: I really appreciate all this input. And it confirms one of the things that we think about when writing, a couple of things. Some of these inputs are clearly not viewed as majorly important. But also the justices have different views of what is likely to be more or less persuasive. So when you're writing to a court with different views, you want to take all those views into consideration as an advocate.

Maybe we should move on now. Well let's ask one more question about the legal arguments, and then we'll move to oral argument. When you are reading briefs, and let's focus more on the merits part of them or merits brief, and not so much on what does it take to get the court to take the case. Because we've already dealt with that. What are the biggest flaws you see? And in seeing those, what is

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your best advice to us so that we could do a better job. And maybe we'll start this time with Justice Thomas.

MS. THOMAS: So maybe since I was more recently on the other side, I sometimes tried to figure out like what -- how to change my brief from the leave act to the supplemental brief. Thinking about the balance of those. So, now that I'm on the other side, here's my perspective. Is to make sure that the supplemental brief is complete in the sense that if you want me to read the section of facts in your brief three briefs ago, let me know that. So be very, very clear about where each part of the argument is, if it's not encapsulated in that supplemental brief. And, you know, ideally it's more honed down. But if it's not, let me know that too. Because I'm reading them both. And if I get half way through and I'm like this sounds so familiar, you know, thinking

about if you have an audience who is reading both of those, what's the difference. How to make those interplay in a way that gives the Court more information in a more focused way.

MS. WELCH: And I'm going to mostly defer because you already heard from me this mornings on this topic. So I did talk a lot about hyperbole.

Don't do it. Try to strip it out. First draft, cut it after that. I understand. It feels good. I know. But also just be sure you're being honest with the court. Those are things that are important to me. But when I surveyed my clerks, also every single one of them has run into that. Where something is not quite represented correctly. Maybe stretched a little. And they notice and we notice. So, yeah, just be thoughtful on that.

MR. BERNSTEIN: So, I have to memorize all this stuff. So, the shorter it is and the more concise and to the point it is, the more I like it. So, it's that old saying that we have so much material that we have to go through and we have so much material that we have to basically know, understand, and simulate into our minds. That for me, when I'm going through all this material, I have to have someone read it. So it takes a little bit longer to go through it. So I like it when it's really to the point and it's easier to memorize the key issues that you're trying to make.

MR. ZAHRA: I basically agree with my colleagues. I think the statement that you lose all of us when you overstate the law or the facts of your case, there is just a line you shouldn't cross. Don't

embellish the facts, and certainly don't embellish the law.

MS. MASSARON: So, we'll move on to talk about oral argument. The Court gives advocates on motives and merits cases a certain number of minutes during which you can speak without being interrupted by questions. And of course we're always trying to figure out if we're using that time, how effectively can we use it. What is it we should say. And when, if ever, should we just waive it. And any other thoughts you have about that part of the argument. And maybe we'll start again with Justice Thomas.

MS. THOMAS: So I'm going to go off script and take a moment, since I have it all here. So it is wonderful to see repeat litigants in the court. I

really appreciate that. And you can tell when people have mooted. But just to remember, as a former teacher, you know, bring those new litigants in. Do all the moot work with them so that they are going to look good and not look bad. So that just, you know, I know that everyone in this room is doing that already.

I really do appreciate when a lawyer understands what the hardest issues are in their case, and has something to say about them in those first two moments. It gives us a good start to think about

where we want to, you know, sort of pick at those harder parts of the case. So I really do appreciate that.

MS. WELCH: Yeah. And I don't think I have much to add. You can certainly do the road map. I do like the time. I tend to -- I have no problem if someone wants to waive their pre-fire zone. By all means that's fine. It is not a downfall to not waive it. So, for me, I tend to kind of like to settle into the case. We transition between cases quickly. For me it's like it settles me in. It centers me in the case at issue. I like that time. But I agree with Justice Thomas. You know, we're here about this. I would like to first start with the issue you probably assume the Court is grappling with, although you never know. Sometimes we take you down a different path.

MR. BERNSTEIN: So I like the fire free just because for me, since I'm doing everything from memorization and internalize all the materials, I like the fire free because it gives me a chance to catch up and it gives me a chance to like okay, now I know this case and I remember it from all the studying I did on it. So I really appreciate fire free. But at the same time, you know, it's one of those situations where it makes the most amount of sense to waive it

because you want the judges to ask the questions. And, you know, the judges have done all the reading. We know all the materials. So we're fully briefed and prepared on what's being argued. And I think it's best to let the time get used where you can answer the questions that the judges have, because that allows you to get right on point to what the case is talking about.

MR. ZAHRA: So, we appreciate the briefs that give us the roadmap up front to tell us why you win. When you come up, it's helpful. I mean, if you're the first case of the call, then we're probably

ready to go. But if it's day two, case seven, it would be helpful to just kick start for us. Help kick start for us. You don't have to give me the full roadmap all over again. But just a reminder. Two or three points of why you win. To me, somebody who comes out and does that and waives, it is showing that they're very confident and they are prepared to fully inform the Court of, you know, why they should win.

MS. WELCH: And I actually want to add another point, which isn't the question directly. But we have seen many of you, very skillfully take some questions. They don't need to feel the need to fill the time, right. It's been remarkable to watch some

of you be like okay, the panel really has no questions. Well with that I will reserve for rebuttal, or whatever. It's okay to sit down and not fill the time. You don't have to. It's up to you, but you don't have to.

MS. MASSARON: So, we're going to have another lightening rod about oral argument. And these points that I'm going to ask you about, many of them are from supreme court advocate David Frederick. I don't know how many of you have read his book on oral advocacy. It's designed for the U.S. supreme court. But it really is one of the best books. And it's the first book I ever read that put in writing the feeling I often get, which is I get more and more stressed as I'm getting ready for argument. It affects everything about my life. I give the argument. I'm very tense. I walk out of the courtroom. The adrenaline drops and I just want to go in a closet and put a pillow over my head. He has that same dynamic. And that was so enlightening for me to realize I'm not the only one who goes through that. And I'm sure there are many of you who have had those feelings, which is why it's a pleasure here to be asking the questions.

So we're going to do the same thing, thumbs up, thumbs down. These are things that you think are

permissible and good advocacy that we should do or that we should -- wait a minute. These are things that Frederick is saying that you should not do. So, if you think you agree with him, thumbs up.

MS. WELCH: I feel like I'm doing double negatives.

MS. MASSARON: So, speak with too much passion, a great deal of emphasis and emotion.

MS. WELCH: So if we do not think we should

do that thumbs up?
MR. BERNSTEIN: Oh, if we do not want to do that?
MS. WELCH: It depends.
MR. BERNSTEIN: I think it's great. If people have passion, that's why we're doing what we're doing. If you believe in your argument, you should share that.
MR. ZAHRA: Not every case demands the passion. But there are some that are pretty, you know, significant and defer to you. You're familiar with jurisprudence where I think that it's acceptable and gets us going.
MS. MASSARON: Read to the Court. Do no read to the Court. I'm going to try to say these in the opposite way they are.

MS. WELCH: Unless you're like referring to a case and quoting like a short -- like quoting from a case and you're just grabbing the quote. That's fine.
MS. MASSARON: Directly answer questions from the Court.
MS. WELCH: So do not?
MS. MASSARON: I'm sorry if I'm messing this up.
Cite authority incorrectly?
(All panel members voted yes.)
MS. MASSARON: Ask questions of the Court?
MR. BERNSTEIN: That's not good.
MS. MASSARON: Attack opposing counsel with sarcasm? Do you have thoughts on that? Do you see that?
MS. WELCH: We really don't.
MR. ZAHRA: I haven't seen that.
MS. WELCH: I don't think, since I've joined the Court, I have seen that. We sometimes see in the briefs things get a little ugly, which isn't great. But it's pretty rare.
MR. ZAHRA: That's kind of reserved for the trial court.
MS. MASSARON: Show anger or frustration with the Court when they're not --

MS. WELCH: No, try not to do that.
MR. BERNSTEIN: It's not helpful, but it still gives you the sense of what people are thinking.
MS. MASSARON: Use humor?
MR. ZAHRA: What do you think for me? I love that.

MS. WELCH: Yes.
MS. THOMAS: It depends on the context.
MS. WELCH: And some of you are really funny.
MS. MASSARON: In argument, can you offer just your top tip of what we can do to be most persuasive.
MR. ZAHRA: Well, you're here. That shows some dedication to the appellate practice and the profession. I had a particularly bad argument in May. It shall remain nameless. But that advocate is not here. People who are here, that I recognize, basically are very good at their skill. And the fact that you're here to learn more suggests to me that you're doing a great job. So just continuing these types of things. It's hard for me to give you anything else case specific beyond that.
MS. MASSARON: Thank you. Anybody else want to add something?

MR. BERNSTEIN: No. I think what Brian said was beautiful. I can't top it.
MS. WELCH: So, obviously I do agree.
MR. BERNSTEIN: And eloquent.
MS. WELCH: I would say obviously yes, the education component. We all know who are sort of stellar, who have managed a difficult panel, a difficult issue, we know who those people are. Our arguments, as you know, are on line. I post them to LinkedIn all the time. You can watch them. So, obviously the more senior folks in the room, you're good. The folks who are just learning their skills and honing their skills, what a great way to observe.
It's very difficult for me to say there is like one big think. Because every case is so wildly different, and every attorney in front of us is so wildly different. So one person who is very persuasive has an incredibly different style than somebody else. You know, someone might like very skillfully raise the fire free zone and skillfully just swat away a bunch of things and sit right down. Someone else is up there much longer and maybe taking longer to explain their argument. It's still excellent. It's hard for me. I admit I don't have like one thing.

MS. THOMAS: Yeah, I agree with what's been said. I think the advice for the people not in the room is to just make sure they understand the

weaknesses in their case and they can address those. But experience helps with that. The community of appellate lawyers helps with that.

MS. WELCH: And apparently AI can now help you.

MR. ZAHRA: I would just add one thing. I really appreciate when rebuttal is true rebuttal. When you come up for rebuttal and you're not just rehashing what you said first, but you're responding to the arguments that your opponent made as to why they should win. You got the last word and true rebuttal that is done the right way, is really outstanding.

MS. WELCH: That's a great point. I have to tell you some of you are so good at it. Really, like you're taking notes. And then you get up and you're like Justice Welch, blah, blah, blah. Justice Zahra, blah, blah, blah. And then you have like 30 seconds or something and you get it done. And often we keep you up there longer anyway. But yeah, I agree with you entirely.

MS. MASSARON: So, I have a couple

questions here about the amount of time for oral argument. The U.S. supreme court has in recent years expanded the time for oral arguments. Some articles I've read say that the advocates are dying because the arguments are going on for several hours and they're being peppered with questions. On the other hand, our supreme court has gone really in the opposite direction, shortening up what was for decades 30 minutes per side. And in every case, partly with the use of MOAs, which only get 15. But also with more limited time in leave grants where maybe it's 20 minutes per side as opposed to 30. And I think all of us would like to know in some cases maybe we want more and maybe in some cases we don't. But what you're thinking is in terms of how you decide how much time you want. And also I think all of us would like to know sometimes the Court thinks our arguments, or the arguments -- not necessarily personally me, or the people in this room -- but just in general, the arguments are not useful. And that's why you're shortening the time. And I think that may be true. But we would like to just know something about your thinking. That's the question.

MR. ZAHRA: Who are you starting with? So can I quote Judge Talbot?

MS. MASSARON: You may.
MR. ZAHRA: Oral arguments for the benefit of the Court. And if we give a shorter time -- we'll say at the conference time we're going to go 20 minutes. But we can go longer. If it's a hot bench, we'll take 20 minute arguments. And they turn into 35 or 40 minute arguments. And we have no problem doing that. But then there are sometimes, you know, the party has 30 minutes. The questions are done after 7 minutes. And they continue on and on and on and on because they never had time. So, quite frankly, I think it is -- you know, we're setting that with the understanding every one of us, if we want to take longer -- and many times it's not just one of us. It's a hot bench. It will go beyond that time. So that's the thinking that I think supports why we're doing what we're doing.
MS. WELCH: I totally agree. So I know it can feel very pressed. I feel like there are cases where we really do need more time and we just are going to hold you up there longer. We just are. I think we're pretty good on letting you finish last thoughts hopefully. Sometimes, you know, we have to stop. But for the most part, I think we're all pretty -- we, up on the bench, are very much fine if a

colleague is holding someone up there longer because they're still working through an issue. And then all of a sudden that raises a different issue and then we're asking about that. So, I think that's how we handle it. Yes, they're short, but we will keep you longer if needed. Remember, we have your briefs. We really have prepared everything. To Justice Zahra's point, it's for the benefit of the Court. It's also for the benefit of the public, right. The fact that we are transparent about our business, it's important that -- I mean, I believe it is important to have oral argument. People have talked about do we even need it. What does it exist for. I think most -- we had a panel last week of different judges and had some input from other states where they had data how much oral argument actually changes your mind. For the most part we go in having a pretty good idea where we are. Not always. Not always. So, you're looking for that. Not always. Depending on where you are.
And oral argument, I mean, you know all know when we're doing it usually. I might have a view on the case. I have a colleague who is on the bubble, and I know what they're worried about. So, I'm going to be asking questions trying to get that colleague on board. I'm looking for that fourth vote. So we

sometimes use it that way too. So it has many purposes.

MR. BERNSTEIN: I really like oral arguments. It's where I'm really able to benefit the most. When you're able to hear from people -- for all intents and purposes, you come to oral argument because you have certain questions. And this gives you the chance to ask those questions. And that makes it incredibly worthwhile to people like myself who basically come in. We're all prepared. We know the material. You know, we're only allowed to talk about these cases with our clerks and other justices. So you might be wondering about what about this issue. What about this thing. And oral arguments gives you the chance to get clarification on something you might be confused about. And it can have a real impact.

MS. THOMAS: I agree. And I think that the study that we heard from, it also talked about how oral arguments impact how the case is written. So even if it's not outcome determinative, you're going to make sure that there is consideration of a particular issue or consideration of an issue in a particular way. And that comes out of oral arguments.

MS. MASSARON: I'm getting a signal here. That's most of our questions. I really want to thank

you for staying, for coming, for supporting this conference this year and all years that it's been going on.

MR. BERNSTEIN: This was a wonderful conference. You guys did such a great job organizing this and putting this together. It was just outstanding, everything. It was just excellent.

MR. ZAHRA: With Megan not here, I just want to echo what Richard said and maybe expound on it a little further. We really thank you. Phil, and everybody who put this on, everyone who is here, let's not forget that we're in a profession that is absolutely essential to our American way of life. And what we do, you know, creates a rule of law in our state, across the nation.

I'm so proud of the fact -- you know, my parents came from a small country, Malta, for a better life when they were teenagers. The fact that we don't fight in the streets over what the -- you know, what the law is or who should rule. It's the rule of law. It's not the rule of people who happen to be in power. And it's a privilege for me now 30 years as a judge. So this might be one of my last few conferences with Mary. Because she keeps talking about retirement.

MR. BERNSTEIN: But you still have six

years left though.
MR. ZAHRA: Oh, I know. Richard is so looking forward to running with an open spot.
And I wanted to tell my colleagues, even though I injected a little bit of humor, the Court really we have our disagreements, but we get along great. We work together well. And it's truly an honor to be serving the people of Michigan and together helping to develop the law for our state. So thank you all so much for doing this every three years. We greatly appreciate it.
AUDIENCE MEMBER: Thank you all. And thank you Justice Zahra for your remarks. We really appreciate it. If any of you who are here is interested in helping to plan the next conference, which will be in 2028, please let us know.
MR. BERNSTEIN: Wow, 2028?
AUDIENCE MEMBER: I think I did the math right. And so if you have an interest, we truly -- we have a very large planning committee. We always need new people. We always enjoy having new people. We try to find roles for junior people, more senior people. We have a need across the board.
If you have an interest, the easiest way to make sure your name gets on the list for planning

calls is to email support@mabc.org. So the same e-mail addresses you were getting your confirmation from, your registration information, e-mail that account and say hey, I'd like to help. We'll make sure that when we start the planning for the next conference probably some time in early 2026, we'll go ahead and get started. But if you have an interest, please do that. We would love to have more people and new people, fresh faces helping to run these sessions.
With that, it is just before 2:00. Thank you so much for coming. Please drive safely.
(The excerpt of the bench bar conference was concluded at 1:59 p.m.)

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CERTIFICATE OF REPORTER

STATE OF MICHIGAN)
) SS
COUNTY OF OAKLAND)

I, LAURA AMBRO, hereby certify that I reported stenographically the foregoing proceedings at the time and place hereinbefore set forth; that thereafter the same was reduced to computer transcription under my supervision; and that this is a full, true, complete and correct transcription of said proceedings.

LAURA AMBRO, CSR-5882
Notary Public,
Macomb County, Michigan.
My Commission expires: July 5, 2026