2010 Michigan Appellate Bench Bar Conference Summary Report

The Bench Bar Conference Committee is pleased to present the 2010 Michigan Appellate Bench Bar Summary Report. This year's conference included insightful panel discussions on civility and collegiality in Michigan appellate practice, tips on filing and responding to emergency appeals, and the complex issues that can arise when courts are asked to follow decisions from another jurisdiction – such as when federal courts are applying Michigan law (which can sometimes lead to certified questions being presented to the Michigan Supreme Court), or when state courts are applying lower federal court decisions regarding federal law.

Conference attendees also participated in numerous breakout sessions with judges and court staff, where they discussed their own experiences with civility and collegiality in Michigan appellate practice. Other breakout sessions focused on the technical aspects of appellate practice, providing attendees with valuable information on jurisdictional issues, effective brief writing, oral advocacy, use of technology, the "ins and outs" of child welfare appeals, and various "hot topics" in the criminal and family law areas.

This year's luncheon speaker was Indiana Court of Appeals Judge Margret G. Robb, who provided her insights regarding civility and collegiality in the legal profession using examples from General Colin Powell's *13 Rules of Life and Leadership.* Attendees were also privileged to watch as the Appellate Practice Section's Lifetime Achievement Award was presented to the family of appellate attorney Kathleen McCree Lewis, who passed away in October 2007. Kathleen was a highly regarded appellate attorney and friend to many. Her professional contributions over the years were instrumental in the growth of the Michigan Appellate Bench Bar Conference.

Finally, attendees received advice on legal writing and advocacy from Bryan A. Garner, a nationally renowned lexicographer, teacher, and lawyer. Using video clips of interviews with eight members of the United States Supreme Court and appellate judges at all levels, Mr. Garner gave a presentation that was both educational and entertaining.

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

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

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I. THE CASE FOR CIVILITY AND COLLEGIALITY: FOSTERING INTEGRITY AND RESPECT FOR THE SYSTEM

A. Plenary Session

1. Introduction by Mary Massaron Ross

Civility is defined basically as courtesy. Collegiality means we are united in a common purpose, and respect each others' efforts toward that purpose. We are collegial to the extent that we respect each other, and one another's efforts. It is not an abstract principle, but a practical one. It involves respect by another branch of government for a court's judgment: public respect for courts, and judicial independence. There have been recent attacks on courts for unpopular decisions. Courtesy and collegiality strengthen public respect for the judicial branch. They involve striving to achieve a common purpose, namely, to work together in a common endeavor, which is to decide disputes under an adversarial system.

Illustrations of civility in the context of conflict include Churchill's letter to Japan, which was civil even amidst war. At oral argument, remember Churchill's civility. It is easy to overlook the value of ritual. But ritual affects what we do. Will the public see what we do as the rule of law, or as attorneys engaged in sophistry. Sharp practice is inconsistent with the rule of law, and unfair. We are reminded of our special role of effectuating the rule of law. This may be symbolized by shaking hands after oral argument. Rituals place limits on the time and manner in which we criticize one another. We are adversaries not enemies. We strive for a just result under law. We strive, in good faith, for a proper balance between advocacy and civility.

Remember the civility of Daag Hamarskjold (Secretary General of the United Nations) in his statement regarding achieving world peace. We have a better chance of achieving civility and collegiality than there is of world peace. Out of our discussions can come new energy and commitment.

The way we act, the words we use, incorporate civility and collegiality. Some words are questionable. Such words as: "disingenuous" or "insincere." By insincere, perhaps the attorney means the opposing counsel's argument is just not persuasive. Such words are used many times in opinions to describe parties' arguments. Other words that may be borderline: "specious" or "nonsensical." But these two words are appropriate if they are really accurate. Do these words ascribe a motive that the user really doesn't know? We might ask ourselves if there is a better word to use.

Is it appropriate to deny an extension request from opposing counsel? Is it appropriate to ascribe motives to a judge?

2. Survey Results

The survey results were presented. The public's perception of justice does matter. Respect for judicial decisions is key. Lack of respect for them erodes overall confidence in the judicial system. There is a perception of lawyers as wanting to win at all costs. It is cyclical. A

client may want the most obnoxious lawyer. This may engender lack of civility by others. Where is the line between effective advocacy and incivility?

3. Panel Discussion

Panelists: Hon. Michael Talbot, Michigan Court of Appeals; Hon. Christopher Murray, Michigan Court of Appeals; Hon. Jane Beckering, Michigan Court of Appeals; Hon. Douglas Shapiro, Michigan Court of Appeals; Mark Granzotto, private practitioner specializing in civil appeals; F. Martin Tieber, private practitioner specializing in criminal appeals.

The panelists were asked what civility means to each of them. Judge Talbot recalled Churchill's civility after World War II, when he was civil even though he lost the election.

Judge Shapiro, who mostly handled appeals from his own wins or losses in a trial court, noted that civility starts at the top, so bosses at law offices must work harder, as well as judges. Some judges can be quite courtly, clubby and warm, within judicial limits. Attorneys are more committed to their positions, but must be civil. Judge Shapiro noted that it is not appropriate for an issue to be deemed waived unless it really has been waived.

Mr. Tieber returned to the issue of what is civility. He is reminded of the definition of pornography – you know it when you see it. It's hard to define, but you can feel it when you see it. Mr. Tieber noted that he had not experienced incivility personally. He noted that there are so many ways to lose a case, so being antagonistic should not be one, though you don't have to be a shrinking violet. Some opinions are rough, but civil.

Judge Murray noted that civility equates to professionalism, and noted that appellate practitioners don't see incivility, and it really doesn't happen in the Court of Appeals. In criminal cases, it may be hard to remember that the defense attorney is just representing her client, even though the crime may have been horrific and there may not be any real question of guilt.

Judge Beckering noted that we are a profession not a business. It is not appropriate to make ad hominem remarks, attacking the other person. The advocacy is better without that. Litigation deals with real people and it's important to be very professional. It is important to be dedicated to getting things right, and refraining from snide remarks. The public would lose respect for the profession, which is based on hundreds of years of tradition.

Mr. Granzotto discussed civility between attorneys. He noted that he usually gets respect, noting that he usually is up against the same attorneys, and respects them too, because they are always civil. Mr. Granzotto noted that equanimity *furthers* your position, and that when you don't respect opposing counsel and her argument, you make your worst argument.

Moderator Megan Cavanagh asked whether civility standards are needed, returning to the question of what constitutes incivility. Joking between judges at an attorney's expense? Hostile questions that a judge just won't give-up on? Interruption of judges by one another?

Mr. Tieber stated that he had never experienced incivility. Mr. Granzotto said he doesn't see it in the Court of Appeals, noting that, in the Supreme Court, there may be "hostile" questions, but they are inquiries and an attorney should welcome them, for they are not personal attacks or belittling of the lawyers.

Judge Beckering asked, are questions perceived as hostile? They are an opportunity to make or break your case. Judge Beckering noted that discussions of prosecutorial misconduct issues may involve personal criticism of counsel. Judge Beckering questioned, if you believe conduct of another attorney is unethical, do you call the person out on it? Is it appropriate to minimize it for the sake of collegiality?

Judge Talbot opined that what judges produce is pretty "bland." Judge Talbot asked, what's the purpose of oral argument? What is its function? The court rule says it's to assist the judges. Many attorneys before the Court of Appeals aren't regulars; they didn't sleep the night before, and they have a script. You, as a judge, are ready with one or two questions. But there may be such a disconnect that the question is not understood. A persistent question is part of the job. You have to suck it up.

Judge Shapiro noted that he had not yet seen incivility in the Court. As an attorney, in opinions, he had seen that issues were not addressed. At oral argument, there may be tensions about time. "Regulars" may find a polite way to get time to make their points; the problem is the non-regulars.

Judge Talbot noted a tip – if a client is present at oral argument, judges understand that. It is appropriate and wise to tell the judges that your client is present.

Judge Shapiro noted that attorneys can handle the use of nonsense, but clients, maybe not.

Ms. Cavanagh read questions from the audience. How should an attorney respond to tough questioning by a judge?

Judge Murray stated that the attorney should take the grilling in stride. If it is from one judge, another judge might help or step in and redirect the discussion. Suck it up. Some attorneys don't get it when their argument doesn't make sense. Judges may on occasion talk over one another but they don't criticize each other's questions.

Judge Beckering addressed the opposite situation where an attorney is not being questioned at all by a judge. She indicated this does not necessarily mean that the judge is bored or has already rendered judgment, but instead, may simply be listening intently to the arguments. The lawyer's job is to address the key, pivotal facts and applicable law on which the outcome of the case turns.

Judge Talbot asked how many think that certain arguments are included in briefs for the benefit of clients, noted that he thought so, and that he can sort between the two. But you run the risk when the comment is incendiary or offensive.

A question was taken from the floor, about why panels point out that an argument is waived, when the panel rejects the argument on the merits?

Judge Murray responded that it's a balancing. The panel wants the party to do a better job in the future, and wants the party losing on the issue to know it was considered.

Judge Talbot noted that sometimes the panel is writing for a commissioner (of the Supreme Court) to make sure the commissioner sees that the issue was considered.

A question was taken from the floor: to what extent does a court's display of civility impact attorneys?

Mr. Granzotto stated that there is no spillover of incivility from the Court of Appeals. You see it in the Supreme Court. You would have to be deft not to see it there.

The question was asked, do you consider this when arguing before the Supreme Court?

Mr. Granzotto noted that you must make arguments to the Supreme Court with an awareness of political splits on that Court. You don't do that with the Court of Appeals.

Mr. Tieber contended that it is a mistake to anticipate a judge's view on a particular issue. He recently got unexpected questions from the Michigan Supreme Court.

The question was taken from the floor, whether Court of Appeals judges hear the tone in the Supreme Court, and consider it in their own efforts to be civil in addressing other judges.

Judge Beckering noted that when you read something that seems to strike a wrong chord you feel it. At times a judge may write an opinion one way, basically to vent, and then another way for publication.

Judge Murray noted that this is not the first time there has been "sniping" on the Supreme Court. It must be harder when you're on the same panel with the same people all the time. Court of Appeals judges don't have time for that, being busy churning-out opinions. The Supreme Court justices do write thorough opinions. But issues of civility do not filter down to the Court of Appeals.

A question was taken from the floor, vis-à-vis circuit courts, are there different collegiality considerations?

Judge Talbot noted that when he was in the circuit court, he had lots of isolation, and that, good or bad, he could do as he pleased, at least in the short-term. In the Court of Appeals it is totally different.

Judge Murray concurred, noting that he loved the change from circuit court to the Court of Appeals, because he feels much more confident when two other judges agree.

A question was taken from the floor, about a small-town judge who felt he got a slap on the hand (from the Court of Appeals).

Judge Talbot noted that Court of Appeals judges are sensitive to that, and try not to be super-critical, even when there is a dreadful record.

Judge Shapiro noted that reference can be made in a diplomatic way, to how things are done, or to inappropriate behavior.

Mr. Granzotto argued that generally trial court judges take it in stride, and move on.

A question was taken from the floor, for the judges: if you see uncivil conduct occurred in the court of first instance, do you address it?

Judge Murray stated that you have an obligation if it is clear, but it is often so hard to tell what the atmosphere was without video. Judge Murray said that he has seen more briefs attacking trial courts explicitly, but that does nobody any good, and in fact it means you have a bad case. Judge Murray recalled one motion for reconsideration that was so bad it was funny, but it had lots of name-calling.

Judge Talbot recalled one brief that argued "this is an appeal from Judge ["x"]. There are also other issues."

Regarding civility between judges and attorneys, Mr. Granzotto noted that you *never* make ad hominem remarks respecting a judge. You criticize the judge's *decision*. But you can call the decisions the way they are. Don't beat around the bush too much. A terrible mistake must be pointed-out.

Judge Murray contended that you can do this in an introduction, and that there is a big difference between professional and unprofessional briefing.

Mr. Tieber stated that you should illustrate *why* the lower court's decision is incorrect. Do not make a claim about a lower court's motive.

A question was taken asking for suggestions of how to diffuse a tense situation at oral argument.

Mr. Granzotto said, use respect always; never disrespect someone, even in a tense situation. Turn to other panel members and explain your position.

Mr. Tieber argued, don't be afraid to give-up if they're not buying it, and move-on to another argument.

A question from the audience: what promotes collegiality?

Judge Beckering: it's your choice of words. Respect solves everything. It's how you say it, not just what you say.

Judge Murray concurred in the judgment, adding, get to know your colleagues. For example, when he sits with Judge Gleicher they know about each others' views and disagree but do so respectfully.

Judge Talbot noted that in the electronic age judges will be in their offices less, and he worries this will result in isolation and loss of in-person communication.

Judge Murray responded that "we keep in touch; we're the type of people who do so."

Judge Shapiro observed that a judge may be closest to people in his or her building, like in a law firm. You talk to people you disagree with, on broader issues. Panels allow you to get to know colleagues, and panel members don't think they're always right.

Question: civility standards? Other jurisdictions have them, and district courts within the federal jurisdiction have them. Standards for judges, and their duties toward one another? Would it hurt?

Judge Murray: not a good idea. Remember what your parents told you. They are not needed. They would suggest a problem.

Judge Beckering concurred in the judgment. They're not needed. They would not change a problematic personality anyway.

Mr. Granzotto commented that, based on his wife's (Judge Gleicher's) interactions, the level of respect on the Court of Appeals is impressive, and unlike the Supreme Court, so there is no need for civility standards.

Judge Talbot stated that drafting codes like that is for people who aren't too busy [laughter].

Mr. Tieber noted that the Michigan Rules of Professional Conduct already provide standards.

There was another question regarding whether civility standards are really needed, noting that the MRPC are minimum standards, and asking whether optional rules of civility are needed, even if they would not be mandatory?

Judge Shapiro noted that the federal rules of civility leave little room for what he called "street justice," asking "are you ever forgiven for not being a saint?"

B. Breakout Sessions – Intimate Conversations With the Michigan Bench and Bar

1. Does Civility Ever Depend on Such Things as the Presence of Clients or an Attorney's Level Experience?

During one of the breakout sessions, participants discussed the presence of clients in the courtroom and whether it affects how judges approach oral argument. It was suggested that many judges may tailor their comments, but it will not affect what questions the judges ask. Most agreed that it is okay to introduce clients, but the attorney should be sure that the client understands his or her role – to sit, listen, and observe. Bringing clients to oral argument can give them a new perspective on the process (i.e., teaching experience for them).

As for whether new lawyers are ever given a "break," so to speak, by other attorneys and judges, the consensus during the breakout session seemed to be that new attorneys should be treated no differently and held to the same standards as more experienced attorneys. It was, however, suggested that some judges may be a little softer in their approach to questioning if it is apparent that an attorney is nervous, etc.

2. How Should You Correct an Opponent's Misstatement?

Participants also discussed how to respond to an opponent's misstatement. It was generally agreed that it is important to be matter of fact and specific about what was misstated. If you are the one who made the misstatement, own up to it immediately and try and correct it as soon as possible (e.g., reply brief, supplemental brief, oral argument). There can be a tension between being civil and responding to an opponent's misleading tactics. Personal attacks should be avoided. Try to de-personalize the response, so it is not aimed at the person, but rather aimed at stating the record accurately. Stick with the facts. Stay away from getting into the motives behind the tactics.

The Court staff and the judges agreed that the record speaks for itself and you really cannot do anything at oral argument. It was suggested, however, that in the most extreme cases you could file a motion to set the record straight. Finally, it was suggested that you should find a way to stand out at oral argument without being "emotional." Attorneys that have a spark will get the judges' attention

3. How Should You Correct an Opponent's Citation to Matters Outside the Record?

Practitioners noticed an increase of attorneys approaching the line of incivility under the guise of advocacy, especially through the increase in citations to non-record material without a motion. This raises the question of whether to file a motion to strike. Practitioners debated this strategy, noting that counsel needs to balance the need to exclude the non-record material versus the possibility of highlighting a weakness of the case by filing such a motion. Some practitioners thought a better approach may be to contact opposing counsel before filing a motion, especially to ascertain whether the citation to non-record material was intentional or negligent.

4. Determining Which Issues to Raise – Attorney's Judgment vs. Client Desires

It was suggested that practitioners should not be afraid to acknowledge weaknesses in their cases, and that they should use their best judgment when deciding which issues to press – sometimes this requires educating the client. Although there may be a duty to raise certain issues if the client demands it, it is still up to the attorney as to how best to present the issue. One overarching practice consideration was the suggestion that lawyers include "we will not stoop to…" type language in their retainer agreements. In other words, that keeping a civil tone to the appellate litigation is our prerogative and our obligation.

5. How Should You Refer to Opposing Counsel During Argument?

Practitioners and judges agreed that there are many ways to refer to opposing counsel during oral argument. The important thing is to do it respectfully. Practice tip: shake hands with counsel after oral argument – the Court notices.

6. Should Oral Argument Time Be Reduced, or Should More Cases Be Decided Without It?

Some practitioners said that they believe oral argument to be an important part of the process, especially when it comes to the client – this is really the only time that the client can see the appellate process in action. Others suggested that it really depends on the case – some cases do not require oral argument at all, and certainly not 30 minutes. Some practitioners expressed a frustration with the 15 minute time allotment in the 6th Circuit Court of Appeals. It was acknowledged that with the number of cases scheduled for argument before a typical panel, there can sometimes be time pressure. As a result, it is important for the presiding judge to use discretion in limiting argument where appropriate.

7. Should Judges Be Candid At Oral Argument About How They Are Viewing the Case?

Many practitioners agreed that it is helpful to know where the judges are coming from and what their concerns are. There are also those times, however, when litigants feel almost held in contempt during oral argument, depending on the panel and how the panel perceives their case. The litigants agreed that, while the experience is not unpleasant, it is still contentious when the panel is attacking the argument and not the person arguing. One Court of Appeals judge agreed that he has seen these types of situations occur at oral argument. If the judge is expressing his or her views and it is unlikely you could change the judge's opinion, litigants still do not want to give up. The judge indicated that sometimes the litigant needs to be the bigger person and indicate that they will just have to agree to disagree, rather than continue the debate and try to persuade the Court. The judge recommended changing the topic/moving to another issue in the case, although the judge understood why a litigant does not give up if the issue is the *sole* issue in case. The judge also recommended that a litigant rest on the brief as long as the Court understands the argument.

Some practitioners expressed frustration at what they view as situations where the panel seems disinterested in the argument; they suggested that a hostile bench is better than a panel that tells the practitioner to "sit down and go home." In that instance, the litigants do not feel like they have had a hearing. A Court of Appeals judge, in response to these comments, said that he looks at oral argument as the time to get his questions answered, and that a lot of times he will sit through an oral argument if he does not have any questions about the case. The problem he faces is the volume of cases; whereas practitioners spend huge amounts of time on their particular case, it is virtually impossible for the Court of Appeals to do the same.

A Court of Appeals judge commented that on every case call, there are 5 to 6 cases he really struggles with. If he has a handle on the case, he probably will not ask a lot of questions. It is difficult where the panel does not want the argument, but the practitioner wants to engage the panel. The judge said that the practitioner should read the panel -- "look for the eye roll." The judge suggested that impatience is a different problem, and that it ought to be obvious that it is time to sit down. One practitioner questioned whether it was better to move on or try and muddle through in an attempt to get another judge's attention with regard to one of the issues. The judge responded that 5 to 10 minutes with no other judge's participation, the practitioner may want to think about relying on the brief.

Another practitioner questioned how one is to know when to back off of an issue when one judge makes a comment clearly indicating his or her position, but it is difficult to read the other two. The judge said that this is a "tricky" situation because a judge is typically not willing to "call out" another judge on the panel. The better approach is for the practitioner to explain that he/she has other issues, ask if the panel has any other questions, and if you do not get any, that is probably sufficient.

8. How to Balance Civility with Advocacy

Practitioners also discussed strategies for effectively pressing an issue based on an opponent's alleged misconduct, i.e., a defense counsel in a criminal case advancing a prosecutorial misconduct argument. The consensus was that thought should always be given as to whether an argument can be presented in a way that avoids ad hominen attacks on opposing counsel, reduces inflammatory language, etc. Participants also recognized that there is a difference between a prosecutor (or party) making a mistake versus repeatedly crossing the line. Participants discussed whether the appellate court should point out when a prosecutor crosses the line. Participants also noted that engaging in prosecutorial misconduct or unethical behavior will ultimately result in a loss of credibility with the appellate courts and will hurt that attorney's reputation

It can be difficult to point out the shortcomings of another attorney, particularly in cases of ineffective counsel. It is unavoidable, however, in cases when counsel has a duty to submit a brief making a claim of ineffective counsel. A practice in civility may be to approach the attorney first to let him or her know before a motion alleging ineffective counsel is filed. The attorney filing the motion might learn the motivation behind the choices that the attorney named in the motion made.

A "delicate" situation arises when the appellate attorney needs to criticize the performance of the trial attorney in order to pursue an argument on appeal. The appellate attorney should remember that the trial attorney's perspective is different and not overemphasize what was "not done," but he or she does have an obligation to inform the client if the record is defective. In criminal cases, if the client wants to raise ineffective assistance of counsel on appeal, the appellate attorney should "reach out to" the trial attorney in advance. A post-judgment motion to make or enlarge the record may be necessary

Some practice tips: (1) maintain a written record of exchanges to ensure compliance; (2) think before you act – write a draft email/letter/opinion that vents the thoughts and then send/issue the final version that eliminates incivility;

9. Stipulations on Extensions for Briefing Deadlines

Stipulated extensions for briefing deadlines were also discussed. It was suggested that attorneys frequently stipulate to briefing extensions, but sometimes a motion is necessary. Most practitioners agreed they would agree to such extensions, except in situations where true expedited case treatment is critically important, such as in a case involving domestic violence. In such a case, telegraphing that you will be unable to agree from the outset might be the civil course. There was a discussion that the west side of the state might be more civil on this point than the east side and that the "regular" appellate practitioners tend to be more agreeable as compared to the occasional appellate practitioners. It was pointed out that in multiple party cases it can sometimes be less expensive to just file a motion to extend, rather than seek signatures on a stipulation.

10. Selecting "Hearing" Dates for Supreme Court Applications

Another area in which practitioners may be presented with an opportunity to display civility involves selecting the "hearing" date for a Supreme Court application. Sometimes counsel will select a date beyond the minimum twenty-days required under the court rules as a courtesy, such as when the notice date falls near a holiday or if the attorneys have conferred about other upcoming deadlines on their other cases.

11. Civility in Briefing

It was generally agreed that histrionics weakens a party's position. The party also loses credibility if relevant facts are misstated (and not later corrected in a reply brief or at oral argument). It was suggested that incivility in briefing doesn't hurt your case, since the law is what it is, but it also will not advance your position. It was also suggested that you should find areas you can agree with your opponent and point that out to the Court before stating what you disagree on.

12. Word Choice in Briefs and Opinions

Word choice has civility ramifications. Participants discussed whether there was a difference between saying a party's argument is "disingenuous" (which participants stated happened all the time) versus that the other side was "lying" or that there argument was "meritless." Often attorneys have a guttural reaction to an argument when instead, they could civilly reframe the arguments.

Most practitioners are willing to use most words with no hesitation *when appropriate* in a brief. The practitioners agreed that they are willing to be more abrasive in a brief than at oral argument and will use words in a brief that they would never use at oral argument. The use of "harsh" words against the trial court judge seems to be in situations where the practitioner wants to get the Court's attention. One practitioner made the point that the key is to show the illogical

nature of the opposing party's arguments through the use of facts and law, rather than characterize an argument with a single word (e.g. disingenuous). Another practitioner countered that the use of harsh words is an attempt try to persuade the Court to sit up and take notice, particularly where the Court has 30 other cases. Some practitioners questioned whether the use of the word "repetitive" is a problem, but most agreed that it is appropriate in the right circumstances (e.g. where a party raises 9 issues that could be condensed to 5).

One practitioner suggested that the word "disingenuous" should never be used because it means dishonest. Another practitioner said that he still recalls, years later, an opinion calling his argument "disingenuous" when he was making an earnest argument. Because the word is too loaded, he never uses the word.

Some practice tips: (1) the goal is to try to have the judges think words like this without using them; (2) if used, they should be a rarity; (3) rather than apply labels, describe what happened; and (4) refrain from characterizing motives.

13. Civility in Opinions

As to the question of "civility" in opinions, a Court of Appeals judge suggested that the author of an opinion must keep the possibility of later Supreme Court review in mind, as well as the immediate audience of the parties and their counsel. Several practitioners urged that the Court should also consider the effect on the attorneys of what appears in an opinion. For example, the Court should avoid describing an argument that was underdeveloped at the trial level as "waived" on appeal.

There were a number of comments about unpublished opinions and the Court members' differing views on them. Some judges treat unpublished opinions as "letters to the litigants" and devote more time to preparing published opinions, treating unpublished decisions as of no authoritative value. The Sixth Circuit, however, will "give deference to" even unpublished Court of Appeals decisions, although it may look more to the Court's reasoning than the result. Many participants urged the Court of Appeals to consider unpublished decisions when there is no published case with analogous facts. This situation is common in the family law area, where some practitioners have attempted, without success, to have the Court of Appeals accept unreported decisions as supplemental authority. Several participants urged that MCR 7,215(F)(3) be eliminated or amended, to allow citation of unpublished cases when no equivalent published opinion exists.

14. Interactions With Court Staff

Some of the Court staff members acknowledged that they sometimes receive telephone calls from frustrated litigants, and that this can result in an unpleasant encounter. Court staff also said that, while it is not common, every now and then litigants will criticize opposing counsel.

The practitioner participants agreed that, particularly with new e-filing issues, the Court staff is very nice/cordial and helpful in answering questions, processing briefs, and giving advice on what to do and how to do things right. Some participants commented that 10 to 15 years ago there was a problem with strict construction of the rules, but that has not been a problem in

recent years. Other participants commented that, particularly with emergency filings, they always find it helpful to contact the Court to facilitate filings. The participants also agreed that the IOPs help practitioners practice better in the Court of Appeals.

Practice tips: (1) the Clerk's office likes to have the original copies of briefs clipped with two-hole binder clips (can still bind the judges' copies); (2) Clearly identify the pleading on the cover page (caption, title, attorney names, and client on front page); (3) Refer to the IOPs and the court rules before contacting the Court but *always* feel free to contact the Court.

15. What to Do When a Practitioner Feels on the Defensive During Oral Argument?

Some participants offered experiences where the panel was perceived as being overly aggressive in questioning practitioners when it was clear that he or she was going to lose and even though the practitioner was making the best argument he or she could make. It was widely agreed that this is an example of uncivil behavior by judges toward practitioners. It was suggested that the panel just let the practitioner make the argument and do the best they can.

16. Civility Implications in Preservation of Issues

Practitioners discussed the problems arising when an opinion states that an issue was not properly briefed/presented, but regardless goes into it as having no merit. The practitioners agreed that this could lead to a legal malpractice allegation (e.g., because the issue was not in the questions presented). This is particularly true where the client is relatively unsophisticated in legal matters (such as in parental termination cases). The practitioners indicated that it would be better if there were a more discreet way to signal to the attorney that there was a problem. This issue certainly turns on the sophistication of the client. Other practitioners referred to this as a "widespread" problem with court-appointed attorneys in parental termination cases. The benefit to pointing out the deficiency is that it draws attention to the need for reforming the system and improving the practice. The difficulty arises in how to explain the ruling to the client, particularly where the client already views the court proceedings as an unfair, arbitrary process. Any attempt to distinguish between poor briefing and a mere "technical" problem with the brief/statement of facts/questions presented is meaningless to the client. One Court of Appeals judge said that he is surprised at some filings and the poor briefing/writing, and hoped that the client would feel some vindication if the Court addresses the issue anyway despite the "waiver."

17. Civility in Motions for Reconsideration

Practitioners discussed issues associated with civility issues in the difficult context of motions for reconsideration. The identified problem was how to be assertive, but to refrain from pushing too much. A few hints on keeping a civil pen emerged: (1) have someone else in your office read the motion before filing; (2) write it, then let it sit for a few days, and return to it to check if its tone is proper.

18. Civility at Oral Argument

There was a good deal of discussion of civility issues at oral argument. In general, practitioners did not have many examples of incivility in that context. Ad hominem attacks on a client, rather than on counsel, were recounted. Some felt that while "ignore it" might be applicable if addressed to the attorney, this is a more difficult response if it's the client because there is concern silence might suggest acquiescence. The consensus was that interrupting the other side's argument is not warranted. But some thought that this might be acceptable if the opposition is addressing something that is not in the record.

Practical tips: (1) consider addressing the issue in one sentence, and offer to reply in greater detail if the panel is interested and then move on (there is a danger of being taken off message by too much of a response); (2) after the argument, a party can ask for permission to file a supplemental brief if a matter needs to be addressed; (3) diminish client expectations on this point by explaining beforehand that there may be such attacks, that such attacks will not sit well with the Court, and that you will need to spend your time addressing the real issues rather than the distractions.

19. Use of Humor?

Practitioners also discussed whether humor could be used to deflect uncivil responses. Some thought that practitioners should let the judges make the jokes and that humor should be left out (except perhaps to respond to a lob from the Court). Others said it can be used, but pointed out it can backfire, and that self-deprecating humor may be what works best.

20. Motions for Sanctions?

Participants did not express much interest in the notion of filing motions to sanction the other side for uncivil conduct. If that type of motion is used, it should be used only in truly egregious situations. Filing such a motion might just draw attention to the conduct in a way that would not be helpful. Practitioners generally agreed that seeking sanctions is not the norm in the appellate courts, and that most attorneys avoid seeking sanctions. Some Court of Appeals judges commented that they have seen cases where sanctions should have been asked for but were not.

21. Should Michigan Adopt Formal Civility Rules?

On the issue of whether Michigan should adopt formal civility rules, practitioners generally did not speak in favor of that. Some called it "Pandora's Box" and felt it would just create an opportunity to call something a rules violation (with the implication being that might not be so). Practitioners felt that such rules would not deter individuals that already engage in uncivil practices.

II. SPEAKER, INDIANA COURT OF APPEALS JUDGE MARGRET G. ROBB (LUNCH SESSION)

Judge Robb emphasized the importance of civility and collegiality in the legal profession. She noted that we do not chose our colleagues. Judges cannot control who appears before them

or select their fellow judges. Attorneys cannot chose judges or opposing counsel. As Judge Diane Woods of the Seventh Circuit said, it is like an arranged marriage where divorce is not an option. Consequently, maintaining civility and collegiality is particularly important.

In 1744, George Washington wrote 110 Rules of Civility and Decent Behavior. Some are still useful today: (1) Treat everyone with respect; (3) Be considerate of others; (45) When you must give advice or criticism, consider the timing, whether it should be given in public or private, the manner and above all be gentle; (47) Do not make fun of anything important to others; (48) If you criticize someone else of something, make sure you are not guilty of it yourself; (50) Do not be quick to believe bad reports about others; (60) Some things are better kept secret; (68) Do not give unasked-for advice; (79) Do not be quick to talk about something when you don't have all the facts; (82) Keep your promises; and (110) Don't allow yourself to become jaded, cynical or calloused.

Aristotle's three means of persuasion also note the importance of civility. One, logos convinces through strict examination of the issues, without exaggeration or embellishment. Two, pathos uses emotion to appeal to the listener, but not name calling. Three, ethos relies on the credibility of the speaker to persuade. A lack of civility damages the effectiveness of all three.

Judge Robb next demonstrated how General Colin Powell's *13 Rules of Life and Leadership* can help lead us to the twin goals of civility and collegiality. Rule 1: It ain't as bad as you think. It will look better in the morning. We should remember that "stuff happens." One loss is not a permanent setback. For example, in baseball, the World Series Champion often loses a significant portion of its games during the regular season.

Rule 2: Get mad, then get over it. It is often useful to give yourself time to cool off before responding to a colleague. Judge Robb advised us not to respond immediately to a provocative email, letter or other communication. Draft a response to vent your feelings, but wait and reconsider your response before sending it.

Rule 3: Avoid having your ego so close to your position that when your position falls, your ego goes with it. In our profession, it is important to be able to let things go. Separate the people from the problem or loss. Different people have different opinions. We need to embrace this.

Rule 4: It can be done. A positive attitude can yield amazing results. It is also important to maintain your perspective and your sense of humor.

Rule 5: Be careful what you choose. You may get it. We should consider the consequences of our positions and actions in our cases. We are shaping the law for the future, not one case. Is an all or nothing position really best for you or your client? In the long term, is it better to sign on to a majority opinion accomplishing part of your goal or to dissent?

Rule 6: Don't let adverse facts stand in the way of a good decision. We need to evaluate each situation on its merits. Perhaps, a particular case is not the best to use to change the law. Learn to separate the facts from "debatable matters."

Rule 7: You can't make someone else's decisions. You shouldn't let someone else make yours. It is ok to disagree with others. But decision making is a collaborative effort. Sometimes it is not better to dissent or to concur.

Rule 8: Check small things. Know the history and tendencies of the jurists you are attempting to persuade and use this information to your advantage. Also, learn to admit it when you do not know something. People will appreciate your honesty.

Rule 9: Share credit. Judge Robb advises us to praise those who assist us. We should consider others' viewpoints and compromise when reasonable. But even when you are not persuaded, acknowledge that you heard the other person, perhaps his argument sharpened your position. The bench and bar work together to fashion the law; it is important that we recognize each other's contributions.

Rule 10: Remain calm. Be kind. There is good in everyone. Find it in opposing counsel or a judge with whom you disagree. Do not gossip about colleagues, no one appreciates it. Do not exaggerate, be clear. Do not distort the other side's position. Look for common ground. This will help to limit misunderstandings.

Rule 11: Have a vision. Be demanding. Be willing to be persuaded by an opposing view. You may find yourself making that same argument in your next case.

Rule 12: Don't take counsel of your fears or naysayers. They will limit your achievements. Optimism will help you much more.

Rule 13: Perpetual optimism is a force-multiplier. It can allow you to accomplish things that would otherwise be beyond reach. No one likes a constant complainer. Appreciate others' time and attention. Be a mentor and seek mentors.

Judge Robb challenged us to apply these rules in our everyday practice and, following the example of Dr. Martin Luther King, to act as "drum majors for justice."

III. <u>TECHNICAL ISSUES IN PRACTICE AREAS</u> (BREAKOUTS)

A. Criminal

1. Guilty Pleas & Sentencing Appeals

a) Guilty Plea Time Limit Restraints

Appellate defenders hope for a court rule that would have the time to file an application for leave to appeal run from the time the transcripts are filed. The time limit can be an issue if one is dealing with late court reporters/recorders and/or lower courts taking too much time in issuing an opinion or order.

SUGGESTIONS: Court personnel suggested ordering the transcripts before the court has ruled or issued an order (to minimize the delay). A motion for superintending control could also be filed in order to get the lower court's ruling and order if necessary. Finally, a motion

could be submitted with the application requesting that the application not be submitted to the panel until the transcript has been filed.

b) Effect of *Padilla v Kentucky,* ___ US ___ (2010)

Will *Padilla* be applied retroactively?

What, if any, other collateral matters will require advice from an attorney – the absence of which could be a basis for ineffective assistance claims?

Example: Currently being considered in the Michigan Supreme Court – Must a defendant be informed of the enhanced maximum sentence before entering a plea to satisfy MCR 6.302(B)(2)? (*People v Kade*, Docket No. 139540).

MCR 6.500 motions are being filed questioning the retroactivity of *Padilla's* application.

Other questions arising in the wake of *Padilla:*

What are the immigration consequences of a guilty plea, and is it ineffective assistance of counsel not to advise on such consequences? Should attorneys be expected to know and advise on immigration consequences? What is the nature of the advice given? (incorrect vs. non-specific)

Will a *Ginther* hearing be required to determine what, if any, advice attorney gave that may have induced his or her client to plead? Practically, what prejudice can be shown?

What are other possible extensions of *Padilla*, and what are other collateral consequences that may be at issue in a guilty plea case, e.g., SORA, child visitation/custody, consecutive sentencing, loss of gun rights? SADO is looking into software where one inputs the offense and consequences are displayed. But what about the gray/catch-all areas where this is not possible?

Participants discussed a proposed court rule amendment to include in advice of rights.

c) General Sentencing Issues

Attendees noted possible problems with issue preservation where trial counsel arguably waives an issue but appellate counsel files a motion for re-sentencing, etc.

At times an appellate defender will find out that there was an agreed upon guidelines range as part of the plea agreement – some will then simply call the prosecutor to confirm the agreement if it is not already a part of the record (as it should be). If there is a hearing to correct a scoring error, the agreement will likely come out anyway and no issue will remain.

A Court of Appeals judge added that the Court at times will see misrepresentations in the facts, such as appellants leaving out the plea bargain in an application for leave.

Attendees suggested that there could be possible ineffective assistance of counsel on the scoring of variables for such a plea bargain; however, reasonable minds can differ on the proper scoring of variables.

Attendees agreed, in response to a question from the judges, that they will often go to the trial court first to consider possible scoring errors before attempting to take the issue to the Court of Appeals.

Also, some appellate defenders have had success with withdrawal of plea issues by dealing directly with the prosecutor first.

SUGGESTION: Attendees agreed that it would be helpful if the presentence report (PSIR) included the basis for the scoring, and it was noted that while a few probation agents already include such information in their reports, most do not.

d) Issues Concerning Presentence Investigation Reports

Appellate defenders discussed the difficulty they often have in obtaining the presentence report in time to review it sufficiently before sentencing – often the reports are not obtained until the day of sentencing despite the new rule requiring them to be available two days before and the rule language requiring the reports to stay within the courtroom further hinders their practice.

SUGGESTION: Attendees agreed that there is a need to meet as a group with the attorney for the Michigan Department of Corrections to deal with several issues including:

- Attorney access to clients, e.g., defendant is out on probation but MDOC will not provide contact information so the attorney has trouble getting back in touch with his/her client.

- Corrections to presentence reports. Participants discussed difficulties in implementing corrections that have been ordered (e.g., MDOC wants an order from the trial court).

- Directing orders to the proper place/person within the MDOC.

Attendees further noted general difficulty (in some counties) in getting the trial courts to act on Court of Appeals' orders (such as completing ordered corrections to presentence reports, etc.). Some have resorted to filing formal motions in the trial court to enforce the Court of Appeals' orders.

One Court of Appeals suggested that the Court could attach an order to its opinion recognizing its decision, which the attorneys could then simply file with the trial court. Another Court of Appeals judge agreed; however, the Court of Appeals would not want to end up retaining jurisdiction.

Participants also discussed retention of presentence investigation reports. Appellate defenders explained that there is unless an order says that an old presentence report is to be destroyed, the MDOC will simply add the new report to the pile.

SUGGESTION: The judges recommended requesting that the Court of Appeals put language in the opinion instructing the trial court to order the destruction of the old presentence report after the correction along with a filing of the new presentence report.

e) Common Mistakes / Tips

What to do when a transcript is not yet available but a deadline is fast approaching? File what you have to meet the timeline. The Court will send a defect letter which is to be cured.

Missing presentence investigation reports.

Failure to order the transcript.

When dealing with a guilty plea case get to the heart of the issue, be error-specific.

Is peremptory relief available? Is there relief other than a leave grant that may easily cure the error?

Should an individual seeking sentencing relief seek it in the trial court or in the Court of Appeals? There are few leave grants per year and a greater statistical chance for relief from the trial court when one considers the various forms of relief available and granted. Further, it may be easier for the trial court to recognize and correct error efficiently. Rethink whether you need to go to the Court of Appeals or whether you should be addressing your problem to the trial court.

2. Issues & Changes in Criminal Law

a) *Arizona v Gant*, 129 S. Ct. 1710 (2009)

The unresolved question is, what does the Court mean when it says "reasonable to believe"? Some think it's more than "reasonable suspicion," but less than "probable cause." Others think the argument can be made for the opposite.

It may be helpful to see if courts have used the phrase "reason to believe" in another context to see what that standard actually equates to. Participants agreed that it should be an objective standard.

Theme in search cases: If the police can reasonably argue that they were concerned about their safety at the time they made the search, then the courts will almost always go their way.

Other thoughts: Some police departments are calling searches incident to arrest an inventory search in order to get over *Gant.* Everyone agrees that the use of magic words won't make the search okay. The test has to remain objective.

b) *Padilla v Kentucky*, 130 S. Ct. 1473 (2010)

Overruled *People v Davidovich*, 463 Mich. 446 (2000).

Does failure to advise impact other collateral consequences of a guilty plea and if so, which ones? (e.g., licensing implications). Where does one draw the line? What is the obligation of the judge and defense attorney?

Because the language of *Padilla* is so broad, appellate counsel would/should argue that anything that has a significant impact on one's life and livelihood fits under *Padilla.*

Does that apply to informing clients that if they have a drunk-driving offense, they can't get into Canada?

The prosecution will continue to argue that it must be shown that the defendant would not have accepted the plea had they been informed of the consequence in question.

The burden really is on trial defense counsel. But should it be on the court given the complexities of immigration law? Should the burden be on the probation officer to investigate and report on collateral consequences?

Padilla's holding is not limited to direct misadvice. What about failure to *investigate* consequences or ascertain facts?

The defense and prosecution have a common interest to determine where the lines are drawn.

Even assuming failures of counsel/misadvice/failure to investigate, the prejudice component remains.

c) *People v Feezel*, 486 Mich 184 (2010)

Overruled *People v Derror*, 475 Mich 316 (2006).

d) *Berghuis v Thompkins*, 130 S. Ct. 2250 (2010)

What are the practical implications of this new *Miranda* case requiring the defendant to actually tell the officers that he wants to remain silent?

Should any advice be given to police officers regarding this case?

Should practitioners ever be advising police officers about anything?

What is it that police are required to do? Does there have to be an affirmative waiver that rights have been waived? It seems that the answer is no. The Court said that a waiver of rights can be implied. An officer does not have to get a straight answer on whether a suspect waives his rights after being read those rights.

If a suspect starts talking after his rights have been read to him, is that a waiver? The answer seems to be yes. The police only have to confirm that the suspect *understood* the rights. (But that could possibly be implied as well).

e) *Maryland v Shatzer*, 130 S. Ct. 1213 (2010)

The Court set a 14-day time frame on when the police can go back to question a suspect after that suspect has invoked his right to counsel. (Regardless of whether it is the same officer or not).

f) *Montejo v Louisian*a, 129 S. Ct. 2079 (2009)

Overruled *Michigan v Jackson*, 475 U.S. 625 (1986). The Court held that where a suspect has not asserted his Fifth Amendment right to counsel, but relies on his Sixth Amendment right to counsel, police may reinitiate interrogation after his *Miranda* rights have been read. However, if a suspect has asserted his Fifth Amendment right to counsel and adversarial proceedings have begun, police may not reinitiate questioning without counsel present and waiver under *Edwards*, or unless the suspect initiates the conversation and the police obtain a waiver.

Raises issues regarding advice to police officers continuing investigation and communication with defendant.

Prosecutors do not think that this will have much of a practical impact. However, the defense thinks that it will and that it will undermine the fundamental principles of our system.

g) *Michigan v Bryant*, 130 S. Ct 1685 (*cert. granted* March 1, 2010)

Future U.S. Supreme Court case. This case shows the Court's continued interest in confrontation clause issues after *Crawford*, *Davis* and *Melendez-Diaz.*

h) *Crawford* and confrontation

Under *Melendez-Diaz*, it seems clear that the introduction of a lab report is barred if the analyst is not available, either through death or some other incapacity.

But, in a recent Michigan case (*Reginald Lewis*), a lab report was let in when it is clear it should not have been under *Melendez-Diaz.*

What about trying to get a police report in from 1997 under Rule 404(b) if the officer who prepared the report is not available? The prosecutor participants seemed to agree that it still requires confrontation.

Other Notes:

A "Notice and Objection" provision will likely be passed.

Confrontation issues go way beyond the basic issue of *Crawford*. It is not always just about availability and testimonial statements. (i.e., in rape shield cases, can you properly conduct cross-examination? (*Gagney v Booker*)).

B. Civil

1. Effective Brief Writing – Facts & Issues

a) Presenting the Facts

Several attorneys from the prehearing staff participated in the session, and they explained that they focus on the facts when writing their prehearing reports. In fact, they view providing an objective overview of the facts as the most important part of the prehearing report. To prepare the report, they go beyond the facts sections of the briefs and review the entire record. They typically summarize the facts in a chronological narrative.

Judges also conduct due diligence in reviewing the facts, but tend to rely on the prehearing report. And while the presumptive writing judge gets the entire record, the other panel members do not, by default, get a complete copy. Because judges expect the parties to present an objective accounting of the facts in the briefs, the brief should avoid adjectives. And use citations to the record to support the factual assertions: the citations add credibility.

The facts section of a brief is like telling a short story, which is why a chronological arrangement often makes the most sense. As a corollary, the practice of organizing the facts section based on which witness said what is rarely an effective approach, as it is hard to tell a story that way. Using a witness-by-witness presentation, one of the prehearing attorneys remarked, also may not be a good idea because that organization may be following the other side's presentation, by tracking what the other side's witnesses said in the course of telling the other side's story, rather than imposing on the story the organization that fits the story from your client's perspective. Furthermore, do not hide pertinent facts; they are part of the story that the other side will bring out, so they should be addressed candidly. One practitioner emphasized the importance of telling a story, suggesting that if you are not persuaded after reading your own facts section, you should settle the case.

Another practitioner suggested that one way to help tell the story while keeping the presentation objective is to use argumentative or persuasive headings to provide a roadmap. A judge in the group agreed that this was a good method.

There was also discussion concerning the issue of attaching transcript pages. While several practitioners noted that the Court of Appeals' internal operating procedures call for the entire transcript, that can result in hundreds of pages of material that is not necessary for the issues on appeal. The prehearing attorneys noted that attaching transcript pages is not necessary for their benefit, as they check the facts by looking at the record they receive, not by looking at the attachments to the briefs. But providing enough pages of the transcript to show the context of the statements may be helpful to the judges, especially to two judges who did not receive a copy of the record.

b) Framing Issues and Raising Unpreserved Issues

Several practitioners were concerned about the possibility of waiving an issue if it is not listed in the issues-presented section of the brief. Each had had the experience, roughly three to

five years ago, of having the Court deem an issue that had been covered through several pages of briefing to be waived because it was not expressly set out in the issues presented. The prehearing attorneys noted that screening for compliance with the rules happens before the briefs reach them, so they do not focus on compliance with that rule. Instead, they will consider sub-issues if it relates to the issue presented.

Participants also discussed raising unpreserved issues and how it relates to the civility concerns expressed during the conference. Although there may be a duty to the client to raise such issues, pointing out a failure of trial counsel may lead a client to consider a malpractice suit. One practitioner suggested addressing an unpreserved issue by filing a motion to remand to the trial court to address the issue; another approach might be to frame the issue as a sufficiency-of-the-evidence issue, where the issue was presented, but the question is whether it was supported sufficiently. And another possible way to avoid conflicts with the trial counsel is to get involved sooner, by having the appellate practitioner act as a second chair at the trial and by having the appellate counsel file the post-trial motions, so that the right issues can be preserved.

2. Effecting Brief Writing – Preservation & Standards of Review

a) Abuse of Discretion Standard

There was discussion concerning whether *Maldonado v Ford Motor Co*, 476 Mich 372; 719 NW2d 809 (2006), has changed abuse-of-discretion review. *Maldonado* states an abuse of discretion occurs when the trial court's decision results in an outcome falling outside the principled range of outcomes. This contrasts with the old *Spalding* test that required "the result [to] be so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment, but defiance thereof, not the exercise of reason but rather of passion or bias." *Spalding v Spalding*, 355 Mich 382, 384-385; 94 NW2d 810 (1959).

Several participants commented that it is difficult to define a "principled" range of outcomes; they preferred the old *Spalding* test. Others suggested that the *Maldonado* standard is no worse than many others – for example, the rational-basis test or the know-it-when-you-see-it obscenity review. Further complicating the situation, many courts have continued to rely on pre-*Maldonado* cases, causing many to wonder whether *Maldonado* has affected any change. Abuse of discretion continues to be a high standard.

Participants compared the *Maldonado* abuse of discretion standard with the *Spalding* test. The *Spalding* test is still applied in custody cases. Some participants suggested that *Maldonado* and *Spalding* are simply different ways of articulating the same standard.

There is an abuse discretion when the outcome is not one of the principled choices. Some participants think of it as a "smell" test. It was also suggested that there is a range in terms of how the standard is applied, and that more deference is given the further the appellate court is away from being in the same position as the trial court. For example, an appellate court cannot review credibility like the trial court can (such as in a sexual harassment case with witness testimony). An appellate court is closer to the position of the trial court in a case with a lot of documents, such as in a contract dispute. There is greater deference when there is a broader

range of outcomes. Where there is a great amount lost from the atmosphere of trial to reading the brief, there is more deference.

b) Mixed Questions of Fact and Law

Participants also discussed how to handle mixed questions of fact and law. One participant said that it was important to note the issue to the Court. Another commented that it was more important to focus on your story and convince the Court that you should win whatever the standard of review. It was generally agreed that the focus should be on the standard of review that benefits the client the most. One problem participants noticed is that litigants are not going back to standard of review in the analysis.

c) Working With Trial Counsel

One participant sought advice on how best to work with trial counsel. It was suggested that a good strategy is to ask trial counsel open-ended questions, to request a short written summary from trial counsel, and to review the entire trial court record.

d) Transcripts and Videos

Some participants stated that practitioners should err on the side of providing transcripts and videos. The participants agreed that watching videos is a slower process than reviewing transcripts for the reason that you can read faster and can pinpoint testimony. Time is the greatest factor in making transcripts easier to review. Some participants find videotaping not very helpful unless the video shows something that must be "seen."

e) Preservation and Waiver Issues

Participants discussed the difference between raising a truly new issue and rehashing an issue raised below, as well as the difference between true "waiver" of an issue and a failure to preserve an issue. It was suggested that when you stand silent when there are grounds for objection, the issue may not have been preserved. If you say "no objection" and relinquish a known right, then it is waived. Despite this technical difference, it was suggested that a failure to object can lead to an issue being deemed "waived." (*ex.* jury instructions).

As a practical matter, the Court of Appeals is looking to see that the trial court had an opportunity to weigh in on what you are arguing on appeal.

f) Statement of Issues

Participants discussed whether the statement of the issue should be detailed or simple. It was generally agreed that you do not need to parse out each individual subissue if each falls under a main umbrella issue.

3. Effective Briefing – Oral Advocacy

a) How Important is Oral Argument?

Oral argument will sometimes change the opinion or change the judges' understanding of underlying facts. One judge suggested that oral argument has an effect on the opinion about 20% of the time, and that it affects the outcome about 10% of the time. Another judge recommended not putting on a show (whether for the client or the Court) and to make sure to focus simply on persuading the Court.

b) Presence of Clients At Oral Argument

Although it is okay to tell the Court if a client is present, it should not be a distraction. For example, the client should not be sitting in the front row handing you notes. Clients also should not be sitting at counsel table.

c) How to Make the Best of Oral Argument?

It was suggested that argument is a refinement of your brief – of the single issue driving the case. Try to develop one overarching theme – the one thing that ties your case together: put that out at the beginning.

Also let the Court know how the decision will play out – will it have an effect on the practice in general? Know what you really want by way of relief and tell the Court, especially if it is different now than what's in the brief.

Be prepared to answer questions on all issues, but prioritize your issues and pick one, maybe two that you will argue. Chief Justice Roberts wrote that he prepared by organizing his arguments on cards and then shuffling them so that he was prepared for any question. It is also important to read the briefs forward and backwards and make sure you have thoroughly reviewed the record.

It was also suggested that practitioners should determine what are the most difficult questions about their position and make sure to have succinct answers. Former Solicitor General Ted Olsen used to say: "Preparation for oral argument is an exercise in knowing everything and knowing who is likely to ask the question you don't want asked and a way to either avoid that question or answer it."

One of the judges talked about an unsuccessful experiment where the panel tried sending out a letter to counsel letting them know what questions the Court wanted counsel to focus on during the argument.

If your case is assigned to a Summary Panel but you get an order to appear for argument, this is a sign that there is a problem somewhere. To be sure, the judges have a question they need answered before they can issue the opinion. If the Court attaches a question to the oral argument notice, that's something you should focus on.

There was discussion of the Supreme Court's 5-minute, "fire-free" zone. Participants agreed that it should be used wisely – it may be the only chance you get.

Judges ask questions for a reason. Don't make the judges chase you for the answer.

Think about how you speak. After the formal opening, "May it please the Court," you want to get to a conversational level. Like a junior partner to a senior partner at a law firm – that level of conversation is most effective. One judge commented that he used to rehearse his oral argument in front of the mirror.

Some practitioners try to do a "moot court" exercise for big appeals, if not every appeal.

There was also discussion in this breakout session about whether the time for oral argument in the Court of Appeals should be reduced. Practitioners were split, but the majority seemed to favor leaving oral argument at 30 minutes.

4. Applications for Leave

a) What Considerations Affect a Decision to Seek Leave and Determine Whether Leave is Granted?

(1) The significance of the decision to the outcome.

(2) Saving expense.

(3) If there is one issue, the facts are undisputed, and the appellant is strong on the law.

(4) Discovery disputes.

b) What Constitutes the Harm Necessary for an Interlocutory Appeal?

(1) Discovery – privilege.

(2) Strong dispositive issue.

(3) If the appellant might get peremptory reversal.

c) Is the Necessity of Undergoing Trial Substantial Harm?

(1) Might not be sufficient.

(2) Important to highlight error which is causing the unnecessary trial.

(3) More persuasive if the case should not go forward at all.

d) Are There Downsides to Seeking Leave to Bring an Interlocutory Appeal?

(1) There is potential risk of having a denial of leave treated as law of the case if the order says that leave is denied for "lack of merit." This is rare, but it happens.

(2) It was generally agree that the determination whether to pursue an interlocutory appeal is subjective.

(3) One instance in which an interlocutory appeal must be pursued is if the issue would become moot (i.e., transfer of venue).

e) Interlocutory Appeals Denied for "Lack of Merit in the Grounds Presented"

(1) Such orders can be considered law of the case.

(2) It may be worth filing a motion for reconsideration. Several practitioners questioned whether there is any basis in the court rules for an order denying leave to appeal for "lack of merit in the grounds presented."

(3) It was agreed that practitioners should advise their clients that this is a possibility.

f) What is the Timing for a Decision on a Application for Leave?

(1) Generally running two to three months.

(2) The panel generally issues an order shortly after the case is submitted.

g) Late Applications

(1) One commissioner and Court of Appeals judge suggested that although parties need to provide a statement explaining the delay, it is unusual to have a meritorious application for leave denied simply because it was late.

(2) Commissioners and judges look at the validity of the reason for the late application.

h) Record on Application

(1) Applications are decided on the papers submitted, so the appellant must provide the portions of the record necessary for a decision.

(2) The appellant may attach all materials brought to the attention of the trial court (*Barnhart Mfg*. case addresses this).

(3) If the case was dismissed before discovery has closed, the appellant may want to bring a motion to supplement the record or to remand to demonstrate what discovery would have shown. *See Heileman v Ingeright*, 385 Mich 1.

i) What if a Motion for Reconsideration in the Trial Court Adds to the Record? Will That Be Considered?

(1) This is a gray area; there are decisions going both ways.

(2) If the additional material is crucial and creates a genuine issue of material fact, it is possible that it may be considered. After all, the reason for seeking reconsideration is to get it right. And many times it is to make sure the Court has all of the record.

(3) Some practitioners suggested that since the court rule allows for a motion for reconsideration, materials submitted on reconsideration should be part of the record.

(4) Difficulties may arise if the trial court rejects the additional material at the reconsideration stage.

j) How Much Difference Does the Relief Requested Make?

(1) Sometimes an appellant will request peremptory relief in the application.

(2) If the judges feel peremptory relief is appropriate, they will grant peremptory relief irrespective of whether a separate motion has been filed.

k) Cross Applications for Leave

(1) A cross application will not necessarily aid the granting of an application that might not otherwise be meritorious.

(2) If leave is granted, leave is limited to the issues in the application but the other party can cross-appeal on whatever they want. This "opens the world" on cross-appeal, and may be an issue for a potential rule change. Some practitioners commented that it does not seem right that the cross-appellant can cross-appeal on any issue and suggested that the right of cross-appeal should be limited. On the other hand, a cross-appeal may not be needed if the cross-appeal is limited to the same issues raised in the application. One can always seek affirmance on other grounds.

C. Family Law – When is a Domestic Relations Order "Final"?

The breakout session on final orders in domestic relations cases was attended by six practitioners (two of whom were the session moderator and recorder, respectively), two Court of Appeals judges, and two members of the Court of Appeals staff. The session began with a Court of Appeals staff attorney describing the initial intake and jurisdictional review process. The moderator then directed the discussion to child custody cases, those being the type presenting the greatest problems. Further topics were then discussed, including separate appeals (by right and by leave) from different provisions in the same order, an anomalous decision treating a post-divorce appeal involving modification of a qualified domestic relations order as an appeal by right, what is an order affecting child custody, etc.

1. Recommendations

- Amend the court rules to preclude a trial court from entering any divorce judgment until each and every issue is resolved.

- Amend the court rules to allow an appeal by right from any order of custody that is intended to be incorporated into a final judgment that will eventually be appealable by right.

- Amend the court rules to provide that the definition of order affecting custody of a child includes any order resulting from a proceeding where the modification standard set forth in *Vodvarka v Grasmeyer*, 259 Mich App 499 (2003) had to be applied because the issue had a major impact on the child.

- Urge practitioners in cases where final order status may not be clear to file a statement regarding jurisdiction describing why the order appealed meets the definition of "final order."

- Expand the letter request rule for publication of unpublished decisions beyond merely the parties to the case (the rule once allowed any interested party to make a request).

- If a panel receives a letter request for publication and thinks the issues are publication-worthy, allow the panel to *sua sponte* vacate its prior opinion and rewrite the opinion to meet publication-quality standards.

2. Initial Review of "Final Orders" i.e. the COA Intake Process

A Court of Appeals staff attorney explained that Court staff start the case, put a new claim of appeal into the computer, and give it a docket number. Once the claim of appeal is registered and given a docket number, the initial staff-person goes through the paperwork to make sure the claim of appeal is complete.

When the staff-person assesses jurisdiction, he or she asks: Was it timely filed? What is the order? Is it a final order appealable by right? Most claims of appeal are straightforward post judgment custody orders. Pre-"final orders" affecting custody are rare.

The initial staff-person either signs off on the claim of appeal, accepting jurisdiction, or identifies any deficiencies and requests more information from the appellant.

3. Bifurcation of Issues: When is a Custody Order Final?

Issues can arise where all custody issues are complete, but support issues are referred to the Friend of the Court. In other words, there is a bifurcated judgment. This creates a catch-22 gap situation, especially if the issue that is deferred is unrelated to the custody issue (like spousal support or personal property).

In those cases, it can take a long time for the other issue to become final. It could take 2-3 months before getting a recommendation from the Friend of the Court, which could then go to the judge, then could get referred back to the referee, then could be objected to and sent back to the judge for an evidentiary hearing. In all, there could be a gap of 6-12 months between the "final custody decision" and the judgment as a whole becoming a final order with everything complete. In the interim, there could be a new, fact-based established custodial environment. For example, in *Wilson v Gauck*, 167 Mich App 90; 421 NW2d 582 (1988), during the pendency of the appeal, a new established custodial environment was created. As a result, it shifts burdens all over the place on remand.

In light of this problem, two participants in the session explained that they are working on a court rule which would permit the custody portion of a judgment, if that is final, to be appealable by right even if there are remaining support issues. This would also remedy the problem in *Surman v Surman*, 277 Mich App 287; 745 NW2d 802 (2007). There, the initial custody order was not appealed at first, but the final order was appealed. When the appellant wanted to bring in the custody issue, the panel found that the appeal on the custody issue was not timely because the "final" part of the custody order occurred so long before.

The proposed new court rule would permit an appeal by right of a final custody order that is part of the judgment, whether or not the judgment is final, or a post judgment modification or order of custody. This would also include post judgment motions for custody that are denied. Ideally, any order affecting custody would be appealable by right. This way, a party could appeal the custody part of an otherwise incomplete judgment, and if the party did not want a bifurcated appeal it would still be okay to wait until the final, complete judgment is entered before appealing additional issues to keep costs down and not confuse other non-final issues with an appeal in the middle. This would be analogous to a governmental immunity appeal.

One Court of Appeals judge commented that this could all be avoided if there is a solid rule that the trial court is simply not permitted to bifurcate issues, and if trial courts are required to resolve all issues within a one-year time frame.

4. Two Issues – Two Ways to Appeal

Participants discussed another issue that comes up in postjudgment proceedings. When there is a postjudgment order addressing a spousal support modification and an award of attorney fees, requiring two appeals – one by leave on the spousal support issue, and the other by right for the attorney fee portion of the order. One participant observed that sometimes there can even be three appeals: custody by right, application for parenting time, and an application for attorney fees.

What also comes up in a divorce case is leaving the issue of attorney fees open. One Court of Appeals staff attorney suggested that the judgment would be a final order, but the attorney fees order would also be appealable later on its own.

There have been cases, however, where the view was to go back and look at the complaint to see if the attorney fees issue was brought as a count, and then if the final judgment did not resolve the issue of attorney fees, it would not be final. This is a problem because many complaints have a request for attorney fees. What happens in practice is that the appellate attorney does not know about the attorney fees until after the trial, when the trial court tells the attorneys that they have 21 days to submit a bill. And then maybe the trial court later has a hearing on it, and there may be a final determination months later. It is rare to have a divorce judgment with the amount of attorney fees specified in it.

A Court of Appeals staff attorney commented that this is theoretical. If the claim of appeal has the judgment, and if no one raises the issue of the final order, then the Court will not look for the complaint to see if all the issues have been finalized. If the judgment says that it resolves the final issues, then the Court will assert jurisdiction. But if someone later files a motion to dismiss, then the Court may look at it later to see if it was pled in the complaint.

One practitioner added that it is possible to consolidate appeals to add the attorney fee appeal later.

5. Treating Qualified Domestic Relations Orders ("QDRO") as Final Orders?

Participants also discussed the issue of treating a qualified domestic relations order as a final order. An example is *Gonzales v Gonzales*, Court of Appeals No. 288518, decided December 3, 2009, out of Wayne county. Although it involved a post judgment denial of a motion to amend a QDRO, the lead sentence in the opinion referenced the appeal as having been brought as a matter of right. Apparently, the jurisdictional issue fell through the cracks, because according to one Court of Appeals staff attorney, a QDRO does not fit the definition of a final order.

This raises the question whether a divorce judgment is not final until the QDROs referenced in the judgment are entered, which could be years (trial courts cannot include QDRO language in judgments of divorce, as it would not be permitted by federal rule). One Court of Appeals staff attorney explained that when a case comes in the order is reviewed; if it says that child support is being reserved for a later time, then that is a flag that it is not a final order. But if

it otherwise looks final, the Court signs off on it and assumes jurisdiction and waits for the parties to raise any issue of an unresolved QDRO or other issue.

One Court of Appeals judge commented that entering QDROs is enforcement, but is not substantive. Although QDROs often do alter the rights of the parties in ways that are not clear in the judgment, and although judgments often are unclear as to what should be in the QDRO, the Court of Appeals looks at this as a contract almost. Though a QDRO may address substantive issues, the judgment itself would still have some finality to it. See *Quade v Quade*, 238 Mich App 222 (1999) (QDRO appealed by leave granted).

6. What is an "Order Affecting the Custody of a Child"?

The participants next discussed the definition of "an order affecting the custody of a child." Although it used to mean custody only, it has been expanded to include domicile affecting custody. There also is *Pierron v Pierron*, 282 Mich App 222, 765 NW2d 345 (2009), which was initially filed as a claim of appeal asserting that it was a custody issue, but then dismissed by the Court of Appeals and reinstated on reconsideration. However, neither the Court of Appeals nor the Supreme Court felt it was a custody issue when they finally got to the merits. Are all "*Lombardo*" cases (i.e., involving disputes over such things as where the custodial parent sends the children to school, see *Lombardo v Lombardo*, 202 Mich App 151, 159 (1993)) going to be appealable by right?

Another question arose concerning when does a parenting time modification case transition into effectively a being a change of custody. One Court of Appeals judge commented that many trial courts are using the standard from *Vodvarka v Grasmeyer*, 259 Mich App 499, 508-509 (2003), for addressing changes in parenting time. Under the *Vodvarka* standards for a change of parenting time, by definition it is a change of custody.

One practitioner suggested that parenting time should involve more flexible standards. One Court of Appeals judge additionally commented that different children need different things at different times, and when the *Vodvarka* burden is introduced with regard to parenting time, then you are looking at custody really.

The participants also discussed the unpublished decision in *Ellsworth v Smith* unpublished decision, No. 294002, decided Feb. 23, 2010, which relied on *Powery v Wells*, 278 Mich App 526, 527-528 (2008), which in turn said that *Vodvarka* does not apply in parenting time modification cases, that section 23 factors are not applicable, and that section 27a is the standard. This raises the question of when does *Vodvarka* apply, and what is the threshold for modification of parenting time? MCL 722.27a is the standard, and is low for modification of parenting time: "Parenting time should be granted in a frequency, type, and duration to facilitate . . ." It was drafted in response to pressure from fathers demanding a minimum amount of parenting time. The Legislature passed it with the intention of having a very low bar as a threshold for parenting time modification. Courts are obligated to grant specific parenting time when asked by the parties. The statute is not permissive, but mandatory.

The participants also discussed current MCR 7.202(6)(a). Was the word "affecting" in there before? Is that an argument that it is a broadly worded rule that any post judgment order affecting custody can be appealed as of right?

One Court of Appeals staff attorney commented that if parenting time was intended, then the rule should have said that instead of saying "affecting custody." One Court of Appeals judge commented that domicile cases will always affect custody if you have two active parents.

The question thus arose concerning how the Court of Appeals is supposed to assess during the initial jurisdictional review whether a domicile order affected custody when all these nuances are not really evident. It was suggested that parties should file a statement regarding jurisdiction on any post-judgment claim of appeal on all but clear custody orders. In cases with domicile or parenting time issues, such a statement should describe why they meet the custody standard.

One Court of Appeals staff attorney said that as a general matter, if the Court sees an appeal coming in that affects parenting time or if it is borderline, then the Court's policy is to tread lightly and assume that it affects custody and accept jurisdiction until someone argues a lack of jurisdiction. It was generally agreed that a motion to dismiss is the preferred way to do that.

7. Unpublished Opinions and The Need for Publication

Many family law practitioners complain about not having published opinions. There are many family law issues for which there are unpublished opinions, but more of these issues need to be addressed in published opinions.

One Court of Appeals judge commented that one of the common criticisms concerns the way that unpublished opinions are drafted. But the opinions do not have all the facts in them, and they may be unique. Or there may be one good issue among 50 unimportant ones. Or there may be a good issue but a pro per party, so that the issue is not framed properly. The Court does look at those and is aware of the publication issues, but sometimes the Court cannot do anything about it.

One example that was discussed is the "double dip" issue. There is only one case which addresses the issue: *Kracko v Kracko*, Court of Appeals No. 287316, decided February 18, 2010, unpublished. But there was no reference to authority. Many articles are written in the bar journal about it, and it is very frustrating.

One Court of Appeals judge asked whether the attorneys ask for it to be published, and commented that requests from an attorney for an opinion to be published are rare. It was suggested that the problem often is that the practitioner is not a family law appellate person and does not appreciate the importance of the issue. The moderator gave an example where an attorney who was not involved in the case wrote a letter request that an opinion be published, but it was not granted because he did not represent one of the parties. The moderator ended up making the request, which resulted in publication of *Valentine v Valentine*, 277 Mich App 37 (2007).

One Court of Appeals judge commented that in family law cases, if an opinion is not going to be published, it is not wise to include factual details because of the nature of such cases. The moderator suggested that if there is a publication request and the panel agrees, there should be an opportunity to re-write the opinion. The judge continued that panels will sometimes get a request for publication, but the panel will conclude that the opinion itself is not good enough to be published, and finds itself in a bind. Sometimes there is an unpublished decision that is really good and could be published if someone requested it. Or, for unpublished opinions that could use work, someone would have to request reconsideration, and then it can be vacated, rewritten, and reissued.

One Court of Appeals staff attorney commented that sometimes an unpublished opinion is vacated and reissued *sua sponte* by the Court, but it is not frequent. And then there would be a new deadline and a new opportunity to file a motion for reconsideration.

A Court of Appeals judge suggested that some judges struggle with what should be published, and could really use a request for publication where appropriate.

8. Summary of Comments and Recommendations

From the discussions during this breakout session, a number of comments and recommendations arose. It was generally agreed that the issue of bifurcated judgments and its impact on appealability of final custody orders in not-yet-final divorce judgments is a trial court problem, not truly an appellate problem. The court rules should possibly be amended to preclude a trial court from entering any divorce judgment until each and every issue is resolved, so that there are no more intentionally or unintentionally bifurcated judgments. If, for example, child support needs to go back to the friend of the court for an updated investigation, the trial court should not enter the judgment until there is a final support number. Or the judgment could be entered and make no mention of re-referral to the Friend of the Court, but instead do that as a separate post-judgment order (perhaps entered after the 21 appeal period) to avoid creating an entry in the Register of Actions that might trigger a jurisdictional review problem in the Court of Appeals.

When custody is finalized before entry of the divorce judgment, sometimes long before, an appeal by right should be allowed from any order of custody that is intended to be incorporated into a final judgment that will be appealable by right. An amendment to the definition of "final order" has been drafted and submitted to the State Bar Family Law Section for approval and ultimate submission to the Michigan Supreme Court.

QDRO's are clearly not "final orders" appealable by right. The *Gonzales* decision was an anomaly.

The definition of order affecting custody of a child for final order purposes should include any order resulting from a proceeding where the *Vodvarka* standard had to be applied because the issue had a major impact on the child. This will include custody modifications and most changes of domicile. This will not include most parenting time modifications which should be governed by the lesser threshold in MCL 722.27a, not the custody modification standard. As stated in *Ellsworth v Smith*, unpublished decision, No. 294002, decided Feb. 23, 2010, the MCL

722.27a parenting time factors apply to this kind of modification, not the MCL 722.23 child custody factors.

In cases where final order status may not be clear to the Court of Appeals during jurisdictional review, the appellant's attorney may want to file a statement regarding jurisdiction describing why the order appealed meets the definition of "final order."

The letter request rule for publication of unpublished decisions should be expanded beyond merely the parties to the case and allow the panel to sua sponte vacate their prior opinion if they think it is not publication worthy, but the issues involved are worthy of a published decision, and allow the panel to rewrite the opinion to meet publication-quality standards.

D. Child Welfare – The Ins and Outs of Child Welfare Appeals: What Advocates Need to Know

1. Common Briefing Problems from the Court's perspective

Lack of briefs – in many cases only the appellant files a brief.

Inadequate briefing – many of the briefs filed lack citation to adequate authority. They fail to apply the facts to the relevant law. Where there is more than one ground for termination cited by the trial court, yet the appellant only challenges one of those grounds, the Court has no choice but to affirm. In some cases the court will address the additional grounds out of fairness, but it is not required to do so.

The Court commonly sees briefs where statutory grounds are challenged, but elements of statutes are not discussed or analyzed.

The worst briefs are those riddled with general propositions of law and no application.

Practice Tip: Every brief should have an introduction immediately preceding the statement of facts. The introduction should include the two or three main points and really focus the issue in order to get the reader thinking about the issues. Also, if something is relevant (i.e., cited), attach it to the brief as an excerpt because the record only goes to one of the judges on the panel. File confidential documents separately and file a motion to seal the document (submit in closed envelope).

2. More Effective Brief Writing

Approach briefing like telling a story. Tell the Court who the players are and summarize where you are going with your legal argument.

Organizational problems are frequent. The trial court files in these cases are voluminous. It is difficult to weave all of those proceedings and files into a concise brief.

3. Using the Record

It is difficult to ascertain what documents have been sent to the Court of Appeals from the trial court and specifically what is part of the record. Participants discussed whether a court rule change is needed to address what is part of the record (i.e., social service reports).

4. Record Problems

Inconsistency from county to county.

Advocates experience difficulties getting the full record.

Difficult to tell what parts of the record have gone to the Court of Appeals.

In some cases the trial court orders less than the full transcript to be provided.

Although motions can be filed to get the entire record, briefing is not stayed.

If advocates are required to file motions to obtain the record, they should ask the Court of Appeals for a briefing extension (i.e., "motion to consider transcripts timely filed").

5. Issue Preservation

Do not give up even on unpreserved issues.

Make sure to bring harmless error arguments.

Do not waive an issue by failing to include it in the questions presented.

When spotting issues, be aware that child welfare law encompasses more than just the Juvenile Code. It incorporates case law, federal law, the "Dwayne B" consent decree, foster care manuals, and Department of Human Services policies.

6. Issue Spotting

Trial practitioners should not wait until the termination hearing to challenge some issues.

Note that jurisdiction must be appealed directly as there is no collateral attack on jurisdiction permitted in an appeal from a termination order.

Adjudication is not appealed until after initial disposition.

7. Changes in the law

Federal law requires the termination petition to be filed for children in foster care for 15 out of the prior 22 months.

Participants discussed how in many cases Michigan is not meeting the federal standards.

Michigan is ranked 23rd in the nation in reunifications.

In re Rood is more than a "notice" case.

8. Variance in Practice from County to County

Some counties are not holding the Department of Human Services to its policy manual.

Some counties have varying practices with regard to record production. For example, what about cases where the trial court takes notice of prior termination case regarding one or both parents? Can an attorney get a transcript of both cases?

Participants agreed that there should be a committee on record production to develop a state-wide standard.

IV. KNOW YOUR COURT (BREAKOUTS)

A. Unlock the Mystery – A Tour of the Court

Court staff began the breakout session by pointing to the Court of Appeals' website (http://coa.courts.mi.gov/) as a source of valuable information relative to the appellate process, from Internal Operating Procedures to information on e-filing.

1. E-Filing

Court staff encourages practitioners to contact opposing counsel if they are unsure about their opponent's capacity for e-filing. Court staff noted that the "email" button in e-filing is usually checked by mistake. Court staff indicated that a Wiznet update is forthcoming, and that at some future date, e-filing may become mandatory.

2. Tips for Less-Experienced Practitioners

The group discussed issues relevant to the less-experienced practitioner, including methods to search for appellate opinions, the components of a research report, and standards for publication.

a) Case Search Vehicles

Court staff noted that published opinions can be found on the Michigan Appellate Digest. Additionally, the Court of Appeals' website allows opinions to be searched by docket number, case name, and text search. The group also identified Case Maker, Google Scholar, and a free Lexis tool as good case search mechanisms, although they do have limitations.

b) Research Reports

Court staff identified the relevant facts, applicable law, analysis, and a recommendation for the result as the components of a research report. The report is meant to be impartial in tone,

and the ultimate recommendation is intended for internal use only. At the end of the day, it is still the judges who make the decision.

c) Standards for Case Publication

The standards for case publication are set forth by court rule, and include an issue of first impression or a ruling that a statute is unconstitutional. A party may request that a panel publish a decision within 21 days of the opinion's issuance.

d) What Should Be Attached To My Brief?

The group next discussed the inherent tension between being cognizant of the amount of material attached to the brief and not requiring the Court to search for record support. According to one Court of Appeals judge, the trick is to make a massive puzzle comprehensible. Practitioners should not overwhelm the Court by attaching unnecessary documents. This requires thoughtful consideration of what is the ultimate dispute and what documents are relevant to that dispute.

e) Factual Statements

The factual statement of a brief should be so objective that the Court could adopt the statement verbatim in its opinion. There should be no argument in the factual statement. The court rules require the factual statement to be in chronological order. One Court of Appeals judge cautioned practitioners to avoid witness-by-witness summaries because they do not tell the Court what happened. The judge requested practitioners to "tell a story" in their factual statement that is not painted in all black/white.

B. Know Your Court – Beyond the Facts & Law

1. How to "Know" Your Panel

One good source of general information is www.judgepedia.com. Knowing the prior professional experiences of the judges on the panel can be helpful in framing your argument.

Practitioners were also advised to determine whether the judges on the panel were on any of the cases cited in the briefs, and to look for other opinions by the judges on the panel involving the same issues. It is important, however, to keep in mind that the judges may not rule the same way, especially if the opinions are unpublished.

In the Supreme Court, it is helpful to watch prior arguments online.

Arrive early to observe how the Court of Appeals panel handles other cases.

2. Unpublished Opinions

Several factors may affect whether an unpublished opinion should be cited: (a) whether the opinion is exactly on point; (b) whether the opinion contains analysis, and does not just state a result; and (c) whether the opinion cites and follows published opinions.

Unpublished opinions may also be useful to show interpretation and application of precedent, especially recent precedent where little other authority exists to aid interpretation. Unpublished opinions can also be used to find published cases on point and to fill in "gaps" in published case law.

3. Electronic Filing in the Court of Appeals

Participants discussed several common issues arising in the course of e-filing:

(a) E-mail service vs. e-service. If you check the box for e-mail service, you may get a deficiency letter if you have no stipulation for electronic service on file. The e-service box now comes up first. Sometimes the e-mail used by the other side is inaccurate or directs documents to an account that is not frequently checked.

(b) Some compatibility issues with Acrobat 9 have been reported, but they are fixable.

(c) Make sure to check formatting, especially for transcripts.

(d) To make briefs user-friendly, consider using "bookmarks." But keep in mind that the judges may not end up viewing the electronic version of your brief.

(e) If necessary, paper copies of exhibits can be filed.

(f) From the Court of Appeals' perspective, e-filing has expedited the processing of applications for leave but otherwise has not had much of a substantive impact.

4. Applications for Leave to Appeal

The number of applications filed may have increased, but the number of applications granted has gone down. Where an application for an interlocutory appeal has been denied "for lack of merit in the grounds presented," the appellant can file a motion for reconsideration asking if the Court meant to deny the application on its merits. If that motion is denied, the appellant can seek leave to the Supreme Court. The consensus was that applications are generally not denied on the merits.

5. Motions in the Court of Appeals

Assignment of a motion depends upon where you are in the appeal timeline. For motions to extend deadlines, file as early as possible. If you are only requesting the initial 28-day

extension on the deadline for a brief, you do not need to give a reason for the extension, but remember that the motion may not be granted before the due date of the brief.

6. Oral Argument

a) Is There Ever a Time When Oral Argument Should Be Waived?

The general consensus was no. If your case is on the summary docket but was given an oral argument time, argument will be very important in your case. The fact that time was given means that issues exist that need to be addressed.

If the other side is not endorsed for oral argument, you can just offer to answer questions from the panel.

b) Should You Plan to Use All of Your Allotted Argument Time?

The general consensus was that very few people actually need all of the time. Experienced attorneys only use it if they really need it.

c) Difficulties With Oral Argument

Participants were unsure whether it is a good idea to try to direct parts of an argument to a specific judge on the panel. Some practitioners feel that it is easy to over-prepare for an argument.

If you have the sense that a panel is tired, it may be helpful to say up front that you will not use much of your time. Then try your best to engage the panel and watch for cues from the panel to determine when it is time to sit down.

It was generally agreed that running into a silent panel can be disconcerting and frustrating. However, it was suggested that practitioners should keep in mind that while a draft opinion has generally been circulated prior to oral argument, oral argument may change the outcome in some cases.

d) Seeking Publication of an Unpublished Case

Seeking publication of an unpublished cases is a strategic maneuver. If you prevailed in the Court of Appeals, you should weigh the benefit of citing a favorable published opinion against the possibility that the Michigan Supreme Court may take greater interest in the case if the opinion is published.

e) Recent Changes to Case Call Affecting the Oral Argument Structure

Complex panels have been eliminated and are now placed on the regular case call, which means that case call is a mix of complex, regular and summary cases. Each case is assigned a certain number of points, which determines how many cases a judge will hear and the time allocated to prepare for those cases. The highest number of points which may be assigned to a case is 28. Regular cases are generally assigned from 4 to 8 points and summary cases 1 to 2 points.

C. Technology Tips & Tricks From Practitioners & Courts

1. Adoption of Technology

Technology is adopted by attorneys in different ways. Small firms can foster more dynamic change. In large firms, change occurs more slowly.

2. Paperless Office

A nearly paperless office can include electronic files that also contain electronic copies of voicemails, faxes, and documents. With a paperless office, attorneys need to consider a record retention policy that makes sense for them.

3. Scanned Transcripts

An example of an effective use of technology for a paperless office is in the handling of transcripts in criminal appeals. Upon receipt, attorneys can scan the transcripts for their own files and provide the originals to their clients. It is inexpensive and there are no storage issues. One caveat applies in Wayne County, which requires appointed counsel to return original transcripts as a condition to being paid.

4. Electronic Documents

While some circuit courts accept electronic filings in Word, PDF is the industry standard. Creating a PDF document is not difficult.

a) A user can "print" to Adobe Acrobat on their computer.

b) A tip is to set the resident PDF Printer as the default printer to ensure that the pagination is consistent between the hard copy and the electronic copy.

c) PDF Factory is very fast. http://www.fineprint.com/

d) Acrobat Professional is very helpful. Adobe 9 will be available in 2010.

After creating a PDF document, open it on another computer to check that the format is correct.

Note that PDFs can be edited. Helpful PDF Utilities include PDF Converter, which can convert a PDF document into Word. PDF2Word does same.

Various types of Adobe Acrobat: Acrobat Pro – good. Acrobat Enterprise – unnecessary for attorneys. The alternatives: Nitro PDF; Fox-It Phantom. For a Mac: PDFWriter; AdobeAcrobat; PDFPen.

5. Scanning Of Documents To Maintain Electronic Case Files

a) Outsource scanning for large files.

b) Before scanning, break down the file into manageable and logical segments.

c) Make separate scanned PDFs for each document received in active files.

d) For carbon paper or brittle paper, make a photocopy first because those originals are hard to scan.

6. Efiling Tips

a) When filing against a jurisdictional deadline, give yourself time to file a paper copy if you cannot complete an efiling for any reason.

b) File the brief separate from the appendices.

c) Bookmark the brief and the appendices so that the judges and staff can navigate them more easily.

d) On the COA efiling system, "submitted" is not "filed." Click the Refresh button to confirm the document has been "filed."

e) The electronic timestamp on the filing will control.

f) In the efiling queue, if reviewer initials are entered in the queue line for the filing, the COA has received document. Look for "A" to indicate accepted, plus reviewer initials.)

g) Watch for error codes that are used to indicate that a filing has failed.

h) Before filing, proofread your PDF and check it on a separate computer to ensure formatting is good.

i) Efilings are not instantly added to docket entries. Court staff manually create docket entries for each efiling so that can take some time.

7. Differences between the Federal and the Michigan Court of Appeals Efiling Systems

a) Federal: the brief is in one file and the exhibits are in another file.

b) No need to efile each exhibit separately for the Court of Appeals.

c) The Court of Appeals efiling system includes transaction fees; the federal does not.

8. Efiling Steps

a) COA efiling webpage: http://coa.courts.mi.gov/efile/

b) Odyssey efiling website: https://wiznet.wiznet.com/appealsmi/login.jsp

c) Create an efiling account with Odyssey before starting an efiling. Click the Registration button on the Odyssey website to set up an account.

d) Filing party – it is only necessary to identify the main party. You need not list all parties who are filing that pleading. The Court of Appeals dockets from the face of pleading rather than the efiling transaction screen.

e) Select Efile & Eserve to have the efiling system effect service. An alternative form of service by email from you directly to the recipient requires a stipulation of the parties under MCR 2.107(C)(4).

f) Submit the efiling "Envelope."

g) Receive a timestamped copy of your filing after submission.

h) Filers can check service details on the efiling system. The details show when the filing was opened by opposing counsel.

i) Check for any errors in the service details so you are aware that a filing did not go through and must be re-served.

9. Issues from the Court of Appeals' Perspective

a) Users can efile in all case types now.

b) Tips for PDF preparation have been posted on the Court of Appeals website at http://coa.courts.mi.gov/efile/efilingbestpractices.htm

c) PDF briefs should be bookmarked both for the content of the brief and for any appendices to facilitate navigation by judges and staff.

d) Common errors:

i) Selecting the wrong document type on the transaction screen.

ii) Trying to enter more than one party per side. Only one party per side needs to be entered. The pleading caption must be complete, however.

iii) Use Efile & Serve rather than Serve Only. The Court of Appeals does not receive the latter.

iv) After filing, check the efile queue for status, errors, etc.

v) In the event of a problem while working on the transaction screen, use CTRL+PrintScreen to capture the filing screen as proof of your attempt.

d) Mandatory Efiling:

i) Approval of the judges is necessary.

ii) The Court is awaiting delivery of final programming code from the vendor.

iii) A move to mandatory efiling may occur by mid-2011.

e) Be sure the Odyssey File & Serve email address is allowed by your spam or junk email filters to make sure you don't miss any service notification emails. Note that Odyssey was formerly Wiznet.

D. Family Law – Transcript Problems

1. Ordering the Full Transcript

Appellant's Responsibility: The appellant must order the transcripts; the court rule says that the complete transcript is required. But, in family law matters, sometimes it is not necessary to order the entire transcript (which possibly covers a period of years, including earlier custody parenting time, or support determinations, and can be cost prohibitive). Appellants can order what they think is appropriate, but the appellee can respond as well and file a motion requesting that the complete transcript be ordered.

Stipulation concerning transcripts: Parties may stipulate to ordering less than the "complete" transcript. This will avoid the Court later raising additional transcripts as an issue. This may be the best approach.

Example of transcript issue in post judgment proceedings: *Post judgment order re: change of custody motion; denied; claim of appeal filed. Do you order transcripts relating to that motion only? How far back do you go? Back to prior order? Transcripts from hearing of prior order? Back to initial trial? What if it was 5 or 10 years ago? 15 years ago?*

There appears to be more strategy involved in handling family law transcript issues than in other areas. Cases may go on for the entire time a child is a minor. Also, judges have long histories with families and may want to go back and revisit an earlier issue.

Deficiency letters from the Court: Many times there is only a relatively short period of time to comply. It was suggested that it is better to get the necessary transcripts up front, get a stipulation, or be prepared to argue that certain transcripts are not necessary. The Court will not necessarily enforce the "complete" transcript requirement so long as there is proof that the transcript was ordered. It is incumbent on the appellant to order the necessary ones and talk to the other party about what is necessary and possibly enter into a stipulation (which should then protect the appellant from a deficiency letter).

Finding out later that necessary transcripts were not ordered: Sometimes it does not become obvious (to either the appellant or the appellee) that additional transcripts are necessary until the briefing period. An appellant can always file a motion and ask for additional time to file his or her brief. Since the Court of Appeals employs an open motion practice, there are other options as well, including filing a motion, even if the brief has been filed, and asking to withdraw and refile it, or file a supplemental brief, if additional transcripts must be ordered that were inadvertently missed.

The attendees discussed various situations where a prior transcript may be required even though it is not necessarily related to the post-judgment order on appeal. Often this is because the trial court will refer back to some part of the earlier proceeding.

Sometimes it may be necessary to make a record in the proceeding being appealed (i.e., by reminding the trial court about rulings during prior hearings).

2. Additional Comments/Issues

There are approximately 350 family cases per year at the Court of Appeals.

Although the Court of Appeals' website has pro per packets available with instructions and templates, a pro per appeal is not recommended. There are many pitfalls. For example, many times the appellant does not realize the need to order certain transcripts and the Court will send a letter. Because many times the appellant cannot pay, there is delay. It often becomes obvious once the case reaches the research division that that the record is deficient.

It is important to make a good record. Family law is very fact intensive. In addition, a lot goes on in chambers. Sometimes the trial judge asks attorneys into chambers and matters are decided there. This needs to be placed on the record.

3. What if the Court Reporter Does Not Comply?

This can be problematic if the appellant is not carefully keeping track of deadlines because the overdue notice postcard goes only to the reporter. Counsel should track the case online to see if the postcard was mailed.

If the transcript is 7 days overdue, a letter goes to the appellant and is copied to the court reporter. At that point, it may be advisable to file a motion to extend time on behalf of the reporter, because many reporters will not do so on their own. It was suggested that it is best to call the reporter and discuss options – including the possibility that you will file a motion to show cause (this usually occurs after a warning letter is issued from the Court that the appeal is in jeopardy of dismissal). A show cause motion will result in the Court getting involved by ordering the reporter to produce the transcript by a set date or appear before a panel to show cause. If the transcript is received, the motion will be dismissed. If a show cause hearing goes forward, the attorney does not need to appear. The Court will often assess costs. The Court has even ordered a "house arrest" of the reporter until the transcript is produced. Of course, if you file a motion to show cause, it may be difficult to continue working with the reporter. It is best to seek an extension of time, and work with the reporter on getting the transcript finished.

Under the federal approach, it is the parties' responsibility to work with the trial court to get the file together and get all necessary transcripts and then come to the court. But, this is difficult in a state as large as Michigan and a burden for appellants.

4. Video vs. Court Reporter Courtrooms

The time to prepare the transcript is the same. With video, it is assigned to a certified court reporter and they are responsible to get it in on time.

5. Register of Actions

It is not always clear what occurred on what date. Or, the reporter of record is not the one who was actually there.

The appellant should be inclusive by including a request for transcripts for everything that looks like a possible hearing on the record. If there is any question, it can be clarified through the court reporter.

One problem is variations between counties in terms of how they set up their register of actions. For example, Genesee only has 2 or 3 entries per page; some entries are still hand written. Some counties charge a fee. Wayne County has some online, but not in family law cases. It can be hard to decipher the Wayne County registers of action and follow the various abbreviations.

Participants were reminded to use the Court of Appeals Clerk's Office as a resource.

6. Friend of the Court Referee Transcripts

It is up to the appellant to decide whether these are necessary (e.g., if they have been read and considered by the trial court).

7. Arbitration Transcripts in Custody and Parenting Time Matters

These are rare.

Questions arise concerning who does the transcript. In arbitrations, usually the arbitrator just pushes the "record" button. Is this technically improper?

8. When Transcripts Are Not Available

There is a specific process for dealing with this situation under the court rules. The appellant should generally file a motion with the trial court to settle the record. Each party files a statement of facts and the trial court hears it and certifies the record to the Court of Appeals. The parties can also stipulate.

a) What if There is No Record of an Arbitration?

An example was discussed where the tape recorder broke and the parties agreed that the arbitrator could just use notes. On appeal to the trial court, the court reviewed the arbitrator's notes and issued an order on that basis. The Court of Appeals, however, concluded that there was no proper record, and that hand written notes were insufficient. The Court thus reversed and ordered a new arbitration.

In the case of an audio recording, the record of the audio would go to the trial court which would issue a decision. On appeal to the Court of Appeals, the Court will typically review the trial court's decision with a transcript as an attachment. In this situation, however, there can be an issue concerning who transcribes the arbitration recordings.

b) Child Interviews in Custody Cases

Many trial courts do not record these at all. A better option might be to record it and seal it. An attorney can request that a recording be made of the interview. This may benefit the appellate court because it would know what the child said. This can be critical depending on the issue, and under the current process there is no way to review the interview.

E. Family Law – After Your Appeal, Now What?

This session explored problems that are often encountered on remand in family law cases. The primary issues discussed included (1) detailed versus general remand orders, (2) the scope of remand, (3) disqualification of the trial judge, and (4) requests for publication.

1. Remand Orders

Often the appellate court will remand a case for "proceedings not inconsistent with this opinion." This can create problems in family cases where there may have been changes in the parties' circumstances during the appeal, the scope of the order is unclear, or there is a procedural question as to exactly how proceedings should commence.

According to one Court of Appeals judge, a general remand order may indicate confidence in a trial court's ability to understand and assess the opinion and proceed accordingly. In cases where there are novel or complex issues or the trial court may have demonstrated a misunderstanding of the law, more detailed instructions would be common. Therefore, it is useful to have the parties specify what relief they seek or what specific procedures they would prefer on remand. This may generally also provide the appellate court with guidance.

One of the biggest reasons for remand is the lack of an appropriate appellate record. This may occur for several reasons: no transcript was requested, the issue was decided in chambers, or in the case of a document used at trial, the actual document may have been discussed but not admitted into evidence.

The IOPs are crafted to allow parties to attach trial exhibits to their application for leave to appeal or their brief. In some respects this is encouraged because only the opinion writer might receive the complete record. If a document needs to be confidential (such as a psychiatric report or financial record), the attorney may submit it in an envelope as an appendix and a motion that it be kept under seal. The consensus was that if the document was sealed by the trial court or by its nature is such that it should remain confidential, that request generally would be honored.

2. Moving Forward on Remand

When a case is remanded, it may be incumbent on the trial attorneys to initiate proceedings in the trial court. A trial judge indicated that the system may not recognize an appellate opinion as a "judgment," and therefore may not automatically trigger a case for a hearing. In those cases, the parties can request a status conference with the trial judge to discuss the scope of issues on remand and procedural aspects of the case to be litigated in the trial court.

For example, in cases where the appellate court has ordered the return of a minor child to one of the parents in a "reasonable time," the court recognizes that it may not be in the best interest of the child to have that change immediately, but it is up to the parties to initiate the change. Allowing that situation to continue for an "unreasonable" time may result in a change of circumstances that will cause the appellate decision to become moot.

Some, but not all case types have a template for remand provided in the bench book. Templates generally are helpful in covering the issues that will need to be addressed on remand.

3. Current Information on Appeal and Change of Circumstances

Generally, appellate courts will review only the record as it existed at the time of the trial court's decision. This becomes problematic because the custody appeal can take anywhere from 8 to 15 months. The first few months are spent simply having the record produced. If there are significant changes in circumstances prior to the appellate briefs being filed, a party can file for a remand to the trial court. Similarly, if it is determined that the issue is a legal issue recognized by both parties (such as the trial court misapplying a formula), they may stipulate to remand and amend the judgment especially if briefs have not yet been filed. Generally speaking, motions to supplement the record on appeal are not granted because the appellate court only reviews the trial court record, but it is common for the appellate court to ask about changes during oral argument.

Because circumstances can change while a family case is on appeal – such as the establishment of a custodial environment – family cases have a shortened briefing schedule. Even with the shortened schedule, a custody case may take up to 15 months on appeal.

4. Custody and Best Interest Factors

Recently, in *Pierron v Pierron*, No. 138824 (decided May 11, 2010), the Supreme Court addressed the procedures for resolving important decisions that affect the welfare of the child. In *Pierron*, the parents had joint legal custody but the mother wanted to change the child's school due to a move of approximately sixty (60) miles. The father argued that the move would create a change in the established custodial environment. The Supreme Court found that the trial court must first consider whether the proposed change would modify the established custodial environment; an adjustment in the environment, such as adjustments in the parenting time schedules, does not necessarily mean that the established custodial environment will be modified. However, even if the custodial environment will not be modified, the applicability of all the best-interest factors under MCL 722.23 must be considered. If the court determines that a particular factor is irrelevant to the immediate issue, it need not make substantive factual findings concerning the factor, but need merely state that conclusion on the record. If the proposed change would cause a change of established custodial environment, the movant must show that the proposed change would be in the best interests of the child under the factors set forth in MCL 722.23 by clear and convincing evidence; if there is no change, the movant's burden is to show that the change is in the child's best interest by a preponderance of evidence. Finally, the factors are examined from the child's perspective as to what impact the change will have. The Supreme Court in *Pierron* ultimately held that the move did not change the established custodial environment, but the trial court still was required to weigh the best interest factors.

The impact of *Pierron* may be that there will be more remands because trial court decisions will or have not properly considered all of the factors, or the appellate court may reverse as to factors thought to be irrelevant. One appellate judge indicated that a way around that might be to state that the factor is deemed irrelevant, but to state how the court would have ruled if it were pertinent.

5. Miscellaneous Discussion

a) Retention of Jurisdiction

The attorneys on appeal may request that the appellate court retain jurisdiction. This can be useful to enforce deadlines or the appellate court can monitor the trial court when there is a new decision.

b) Remand to a New Trial Judge

Attorneys often request a remand to a different trial court judge. However, those requests are never granted unless there was a motion for disqualification in the trial court. Grounds could include, in the context of a custody case, that the trial court judge had interviewed the child(ren) and became too "tainted," or that there were significant irregularities. Dissatisfaction with the trial court judge or the judge's past findings alone usually will not suffice. In rare instances, the appellate court might grant a motion if there is a basis for finding that the trial court judge will not follow the directives from the appellate court.

c) Publication of Cases

Finally, to publish an opinion, the Court of Appeals must receive a request from one of the parties. It is best to make the request prior to the opinion being issued because opinions originally not written for publication may be written more summarily or would otherwise require modification prior to publication and the court cannot or would not be willing to make those changes. Parties may be reluctant to make the pre-decision request if it is likely that the Court of Appeals may rule against them.

V. <u>TOP TIPS AND PET PEEVES – EMERGENCY FILINGS</u> (PLENARY)

Panelists: Hon. Michael Talbot, Michigan Court of Appeals; Shari Oberg, Deputy Chief Commissioner, Michigan Supreme Court; Neal Villhauer, Commissioner, Michigan Court of Appeals; Jack Walrad, Commissioner, Michigan Court of Appeals.

A. Important Considerations for the Court in Reviewing an Emergency Appeal

The two most important considerations are the merits and the timing. The merits are reviewed by the assigned panel, while the clerks/commissioners will review the need for emergency status. The Court will look to see if the attorney/party has treated the matter as an emergency; in other words, an emergency resulting from needless delay by the appellant will not necessarily be viewed as an emergency by the Court.

It is important to alert the Court if there is a date by which action is needed, and to be clear about why action is needed by that date. Make it easy for the Court to figure out what you want and why it is urgently needed. Be sure to use the court rules governing emergency appeals in order to make effective use of the Court's internal processes.

Some cases are given priority treatment, not express emergency treatment. Judge Talbot emphasized the need to alert the Court as to how the issue came up in the trial court and how that ruling or order warrants emergency attention. While delay on the part of the party/attorney isn't dispositive, it is essential to let the Court know that delay which appears to be on the part of the appellant, may in fact have arisen as a result of being just retained.

Keep the issues on appeal limited to one or two very specific issues which are directly impacted by the need for emergency relief. Don't toss in every interlocutory loss before the trial court as an issue – instead focus on the specific matter which needs attention immediately.

Evictions, receiverships, election cases and cases involving immediate, irreparable harm will be most likely to get emergency or priority treatment.

B. Tips from the Court for a More Effective Appeal

Judge Talbot suggested calling both opposing counsel and the Court to alert them of the coming emergency filing; this is a matter of courtesy and civility to both opposing counsel and the Court. While opposing counsel will still get a call from the Court upon the filing to discuss the timing of the response, it alleviates the Court from being the bearer of "bad news" in terms of being the first one to apprise opposing counsel of the coming emergency filing.

A matter which needs action in 21 days or less should be accompanied by a motion for immediate consideration. If action within 56 days or fewer is required, it is a priority matter, but not necessarily an emergency. Action in less than 7 days is treated as an emergency.

The Supreme Court looks at an emergency somewhat differently from the Court of Appeals, so a filing at that Court should always be accompanied by a motion for immediate consideration to explain the nature of the emergency. This will ensure that the filing gets to the commissioners immediately for review. Supreme Court commissioners will look to both the emergency nature of the timing, as well as the case on the merits, so be sure to address both issues as fully as possible.

Both Courts would like as much of the record below as is possible in order to review an emergency filing. Because they will not get the lower court record, include in the filing any trial court motions and responses, orders, depositions, and trial court hearing transcripts necessary to support both the emergency nature of the filing as well as the case on the merits. Be sure to order the transcript on an expedited basis.

A stay must be requested from the trial court in the first instance and any stay motion in the Court of Appeals must be accompanied by the trial court's order and the transcript on the hearing. If necessary, file a motion along with the motion for immediate consideration and the application for leave, asking to excuse the order and/or transcript requirement, if the trial court won't sign an order, or if the transcript can't be obtained immediately.

Attaching your opponent's brief below permits the Court an opportunity to review the matter possibly before your opponent has filed a response and may generate peremptory reversal, since it allows the Court to review arguments more fully, in more expedient fashion. A separate motion for peremptory relief is not required. Include the request for peremptory relief in the request for relief in the application.

Be sure to personally serve opposing counsel. This permits more immediate review by the Court and permits the Court to require more immediate responsive briefing from opposing counsel.

As an appellee, be sure to point out why the issue either was not preserved before the trial court and/or why there is no immediate need for review. If possible, demonstrate how the appellant was not diligent in pursuing the matter.

C. Court Procedure on Emergency Filing

1. Court of Appeals

The Court of Appeals will docket the case, confirm service on opposing counsel, and give opposing counsel a response due date. The matter will then be sent for commissioner review, who will also notify the assigned panel of the coming emergency matter. In true emergencies, Judge Talbot noted that it is possible for the panel to confer and rule that same day, issuing a verbal order after receiving an oral report from the reviewing commissioner(s).

In order to avoid forum shopping, an emergency filing will be sent to the correct district office, even if filed in another, if there is time. If not, then it may be dealt with in the office where filed.

2. Supreme Court

The Supreme Court will forward an application with an immediate consideration motion to the commissioners immediately. The commissioners create a plan for response and ruling in their report. If you are the recipient of a Supreme Court application, call the Court to advise of when you can file a response, and any other issues which may be pertinent to the need for emergency review or the lack thereof. If necessary, the commissioner may obtain additional information from the record maintained in the Court of Appeals. The report and the pleadings are then submitted to the Court for review and ruling.

VI. COLLEGIALITY BETWEEN PARALLEL COURTS – ERIE / REVERSE ERIE / CERTIFIED QUESTIONS (PLENARY)

Panelists: Hon. Marilyn Kelly, Michigan Supreme Court; Hon. Robert J. Jonker, United States District Court for the Western District of Michigan; Professor J. Mark Cooney, Thomas M. Cooley Law School.

The panel addressed the *Erie* doctrine, the reverse-*Erie* doctrine, and certified questions. The first question posed to the panel was whether *Erie* affected a plaintiff's decision of where to

file. Judge Jonker responded that when he was in private practice, he did not consider *Erie*. He focused on other issues, for example, the jury pool and whether he was comfortable practicing in the forum.

Next, the panel addressed whether the federal courts give unpublished Michigan Court of Appeals decisions more deference than the Michigan state courts. Professor Cooney noted that unpublished decisions are readily available to litigants, state courts, and federal courts. Everyone is reading and considering these opinions, even if they are not cited prominently in briefs or decisions. Justice Kelly cautioned against using unpublished Michigan Court of Appeals decisions because they are not as well-reasoned. The authors of these opinions did not intend for other judges to rely upon them. Judge Jonker noted that he considers unpublished Michigan Court of Appeals opinions. He has no power to declare state law under *Erie*, thus, he prefers to use all the information available.

Justice Kelly then addressed whether any weight should be given to *dicta* in Michigan Supreme Court and Michigan Court of Appeal's opinions. Justice Kelly discouraged her fellow jurists from relying on these statements. In particular, she did not believe that *dicta* in old Michigan Supreme Court opinions should be given any weight, noting that the composition and ideas of the Court have changed.

The moderator next asked Judge Jonker what the federal district courts do when faced by Sixth-Circuit precedent interpreting state law that has been rejected by later decisions from the state's intermediate appellate courts. Judge Jonker noted that the goal is to find Michigan law, and in such a case, the Sixth Circuit should change its mind.

Following this question, the panel began discussing certified questions. Judge Jonker offered his general thoughts. He does not like certified questions. He loses control of the case. Also, as a judge, he would not appreciate being forced to address a certified question. Judges do not like abstract questions. The deciding court does not have the advantage of being familiar with the particular case. Justice Kelly addressed the factors that the Michigan Supreme Court considers in granting certified questions. She noted that the Court decides the question much in the same way that the Court decides whether to grant leave to appeal. Among other things, the Court asks whether there is a substantial question of law; whether the question has been decided before by the Michigan courts; and whether the parties have provided sufficient factual information to allow the Court to resolve the question. The Court also considers the identity of the court seeking an answer. If the United States Supreme Court asks the Michigan Supreme Court to resolve a question, the Michigan Supreme Court will likely do so.

The moderator then directed the panel to the reverse-*Erie* doctrine. The reverse-*Erie* doctrine binds state courts to follow the decisions of the United States Supreme Court construing federal law. But Michigan state courts do not give the same precedential effect to the decisions of lower federal courts. The panel was asked whether state courts should take into account *Erie's* goals of avoiding forum shopping and avoiding the inequitable administration of the law. Justice Kelly noted that forum shopping is an evil that jurists should seek to prevent. Judge Jonker responded that state courts are under no constitutional obligation to follow the local federal court's interpretation of federal law. The state courts should try to reach the correct conclusion, rather than blindly following the local federal court. Professor Cooney addressed

how an attorney in private practice should handle a reverse-*Erie* situation. The attorney should take the position that is best for his client. If that position is the local federal court's position, then note the forum-shopping concern but do not make this your central argument. If the local federal court's decisions are against you, explain to the state court why the contrary view is better.

VII. REDUX – CIVILITY AND COLLEGIALITY: FROM ADVOCACY TO SHARP PRACTICES AND BEYOND

Panelists: Scott Bassett, private practitioner; Hon. Michael Cavanagh, Michigan Supreme Court; Hon. Elizabeth Gleicher, Michigan Court of Appeals; Valerie Newman, State Appellate Defender Office; Rosalind Rochkind, private practitioner.

The moderator solicited the panelists' reactions to a list of examples of "uncivil" behavior, including misrepresentation of the record; filing briefs or motions late; providing inadequate notice to opposing counsel; denying requests for stipulated extensions or opposing motions to extend time to file briefs; using condescending or offensive language; ad hominem attacks; and attributing improper motives to opposing counsel.

Scott Bassett indicated that he "sees all of these" in family law appeals by nonappellate attorneys, who treat the appeal as if it were a trial court motion and are emotionally involved in the case. He estimated that one-third of the time opposing counsel will deviate from the legal issue. He urged attorneys to act as "public citizens" and officers of the justice system. Noting that the "Lawyer's Oath" incorporates many references to civility in behavior, he emphasized that the lawyer's goal should be the advancement of the quality of justice. He made the humorous observation that, while advertising "aggressive" representation attracts potential clients, they often lack the funds to pay for it.

Valerie Newman noted that criminal defense practice also generates emotional responses. Because public defenders cannot chose their clients or their cases, prosecutors should recall that the attorneys are only doing a job and that sometimes an attack on the other side is the result of pressure from a client. If an opponent's brief is late, she appreciates that the reason is probably a "resource issue," not an attempt to "game the system." Attorneys' credibility develops over time, via practice and in settings like the bench bar conference.

Justice Cavanagh rarely sees "incivility" at the appellate level, where it is "frowned on." He contrasted the practice of law when he entered it, in the 1960's, with today's world. Then, the legal community was relatively small, most attorneys knew each other and were friendly. Now, the number of lawyers has risen exponentially, the poor economy has increased competition and lawyer advertising tends to promote "uncivil" behavior. He termed it "laudable" that the subject of civility had been raised. As to members of the bench, he said that they should find ways to disagree civilly. While, for example, a draft opinion may include "zingers" directed at the dissenting judges, a final opinion should not.

Judge Gleicher also noted the change in climate for practitioners, from the perspective of her experience as a former plaintiff's attorney. She observed that economic pressures and the "constant flux" of the law had decreased civility. Increased competition and the inability to

predict what the courts would do have made it more difficult to be "civil" in civil practice. She found it necessary to "develop a tough shell" to deal with incivility, when some attorneys have become "rapacious" in order to succeed. This climate may have improved lawyers' technical performance, but it has reduced the effectiveness of and respect for the legal profession. Appellate practice, however, features a greater degree of civility; vigorous advocacy can include passion, but not sniping at opposing counsel or misrepresenting the record.

Rosalind Rochkind spoke of the greater degree of collegiality among appellate practitioners than trial attorneys, growing out of their familiarity with each other. She observed that the court perceives "uncivil" behavior itself, such as inaccuracies in referring to the record.

The moderator presented a summary of the results of an on-line survey of the Michigan bench, bar and court staff on "civility," conducted in March of 2010. Among the points that emerged were that clients expect uncivil behavior between attorneys but do not accept it from the court. An attorney may need to explain to the client that civility toward opposing counsel does not represent ineffective advocacy. She invited comments from the panel.

All three practitioners were emphatic that the attorney should control the aspects of the appeal process that relate to civility, such as stipulated extensions or conferences with opposing counsel. All, however, agreed that attorney should explain to clients what is happening, so they will not be misled by appearances. Telling an appellate panel at oral argument that a client, or a client's family, is present is good practice for the attorney and beneficial to the court.

When asked if Michigan should adopt "civility standards," such as those found in some other jurisdictions, none of the panelists saw a need for them.

The moderator posed the question of whether an attorney should respond to incivility in an opponent's brief. Judge Gleicher said she observed this more in motions than in briefs. Justice Cavanagh suggested that "egregious" instances may deserve a response. Mr. Bassett recommended the "Atticus Finch model" – step back and assess the situation. Ms. Newman suggested conferring with colleagues, while Ms. Rochkind favored judicious use of footnotes.

In response to a question as to what role the appellate judiciary should play in controlling "uncivil" behavior, Justice Cavanagh said the bench has an obligation to indicate that incivility does not help the proponent's case and should not let it pass. Judge Gleicher thought the courts should "call it out." They both agreed there was a particular need to reach the "occasional" appellate practitioner.

The attorney members of the panel differed regarding resolving problems with the other side outside of court. Ms. Newman regularly approaches prosecutors' offices and generally finds them amenable, while the private attorneys rarely contact opposing counsel before oral argument.

All agreed that an intentional misrepresentation of the record indicated a weakness in the party's case.

The panelists were invited to summarize their observations. Judge Gleicher hoped that the audience would take a "long-term/big picture" view and keep in mind that the goal of appellate practice is to further the development of the law. Ms. Rochkind emphasized "active listening" and getting to know other attorneys. Mr. Bassett reminded the lawyers of the "Lawyer's Oath" and looked forward to a refocus from "self" to "community." Ms. Newman said she proceeds on the assumption that all parties are working for justice and that respect for others is part of what "justice" is. Justice Cavanagh concluded by asking participants to identify the factors that are "driving away" civility in the law. "Law is not simply a business, but a profession," he reminded the group. Events like the 2010 Michigan Appellate Bench Bar Conference go a long way to reinforcing that view.

VIII. SPEAKER – BRYAN A. GARNER (LUNCH SESSION)

Bryan Garner offered advice on how to be a more effective brief writer. He organized his discussion around some of the tips featured in his new book, *The Winning Brief: 100 Tips for Persuasive Briefing in Trial and Appellate Courts*. Garner opened by noting that there are two types of attorneys: clarifiers and obfuscators. You want to be a clarifier. You want to be the one explaining to the judge why the law favors your position. You do not want to be an obfuscator, confusing the issues for the judge. You need to be able to make your point in the first page of your brief. Avoid the formalistic phrases that used to dominate legal writing. Move directly to the point and provide the judge with the "implements of decision."

Garner suggested dividing writing time into four phases. First, the madman who brainstorms ideas. The madman must be allowed sufficient time to run wild. Do not begin writing before you have had time to consider the issues. Second, the architect who organizes those ideas. The architect should identify the "implements of decision" and then determine the most persuasive order of presentation. You should not adopt opposing counsel's order of presentation blindly. Third, the carpenter who implements the ideas and drafts the brief. A brief should be written quickly, without stopping to edit. It is best to complete your first draft in as few sittings as possible. Fourth, the judge who reviews and revises the brief. In this phase, we should be attentive to even minor details. Every mistake harms our credibility. Garner recommended having others review your briefs as well. He also advised setting deadlines for each phase.

Lastly, Garner focused on how to draft your issue statement. Garner prefers what he calls a "deep issue." This is a multi-sentence issue statement that is 75 words or less, including both facts and law. Each sentence must be clear, without needing to read further. It is often helpful to use a syllogism.