State Court Administrative Office
Child Welfare Services Division
Michigan Court Improvement Program
Governor's Task Force on Child Abuse and Neglect

Child Welfare Appellate Guide

2013

This project was funded by a federal Children's Justice Act grant to the Governor's Task Force on Child Abuse and Neglect administered through the Michigan Department of Human Services, under the Child Abuse Prevention and Treatment Act, Administration of Children and Families, Department of Health and Human Services, CFDA 93.643, being sections 107(a), (b), (c), (d), (e), and (f) as amended (42 USC 5101 et seq.); and the Victims of Crime Act of 1984, as amended (42 USC 10601 et seq.). In addition, this is a joint project of the State Court Administrative Office and the Governor's Task Force on Child Abuse and Neglect, chaired by the Honorable Kenneth Tacoma, Chief Judge of the Wexford County Probate Court.

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CHILD WELFARE APPELLATE GUIDE

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§1 Introduction

The appellate system serves important functions in child welfare cases. It ensures that the relationship between a parent and her child is not unjustly terminated. It forces parties and courts involved with the child welfare system to strictly follow statutes, court rules and agency policies. And perhaps most importantly, it preserves public faith in the system by serving as an independent check to correct mistakes that occur.

But the appellate system is only as good as the advocates who appear before it. This guide is intended to be a resource for those advocates, both those who have practiced child welfare law for many years and those who are new to the area. This guide will cover the nuts and bolts of the appellate process, will discuss basic issues related to writing briefs and presenting oral arguments, and will highlight some of the common issues that arise in child welfare appeals.

However, this guide is not a comprehensive primer on how to write persuasive briefs or make effective oral arguments. Much has already been written on these topics. Resources to help advocates improve these skills are listed in the appendix to this guide.

§2 Appealable Orders

When confronted with the possibility of appealing a trial court's decision to the Court of Appeals, an appellate attorney must determine whether the client has a right to appeal the decision or whether he/she would have to appeal by leave.

§2.01 Appeals As Of Right

MCR 3.993(A) states that the following orders are appealable to the Court of Appeals by right: 1) an order of disposition placing a minor under the supervision of the court or removing the minor from the home; 2) an order terminating parental rights; 3) any order required by law to be appealed to the Court of Appeals; and 4) any final order. An order of adjudication can be appealed as of right in an appeal of the initial dispositional order.

Appeals as of right are governed by MCR 7.204 and are initiated by filing a claim

of appeal with the Court of Appeals. The steps for doing so are discussed in §4.01.

§2.02 Appeals By Leave

All orders that are not appealable as of right can be appealed to the Court of Appeals by leave. MCR 3.993(B). For example, this can include orders related to parenting time, discovery or any other issue that occurs at a pretrial, dispositional review or permanency planning hearing. An application for leave to appeal may also be filed where an appeal as of right existed if it had been filed in a timely manner.

Appeals by leave are governed by MCR 7.205 and are initiated by filing an application for leave to appeal with the Court of Appeals. The steps for doing so are discussed in §4.02.

§3 Assisting A Client In Deciding Whether To Appeal To The Court Of Appeals

The decision on whether to appeal a trial court's decision rests with the client, who determines the goals of the representation. But appellate attorneys can play an important role in helping clients make that decision by researching the merits of a potential appeal and counseling the client on the impact that an appeal may have on the client's case.

§3.01 Client Interview

The appellate attorney should always meet with the client to explain the attorney's role and to inquire about the underlying proceedings. At the first meeting, the attorney must explain how her role differs from the role played by trial counsel. The attorney should also tell the client that the appellate process often takes a long time to resolve issues and that the chances of prevailing are slim. This information will help the client manage her expectations about the process.

The attorney should ask the client to bring any paperwork related to the case in her possession, in particular the order that may be appealed. The attorney should give the client the opportunity to discuss the proceedings and to identify the mistakes that she believes the court or her trial attorney made. During the conversation, the attorney should be thinking of potential appellate issues raised by the client's narrative that may necessitate further investigation.

In the meeting, the attorney should also spend time assessing the specific goals of the client in seeking an appeal. Does the client hope that an appeal will expedite the return of her children to her care? Does the client wish for her parental rights to be restored? Or does the client simply want an opportunity to be heard before another court on the merits of her case? Without identifying the specific goals the client wishes

to advance, the attorney will not be able to develop a recommendation for the client about whether an appeal should be pursued.

§3.02 Factual Investigation/Legal Research

While in some cases an attorney may be able to advise a client immediately that an appeal would not be successful or would not advance her goals, in most cases the attorney will need to do additional investigation before making a recommendation to the client. At a minimum, the attorney should review the trial court file, including the confidential file, and should consider reviewing the transcripts, depending on the client's ability to pay for them and the deadlines for a potential appeal. The attorney should also have an in-depth conversation with the trial attorney about her assessment of the case and whether the trial attorney thinks any grounds for appeal exist.

While investigating the facts of the case, the attorney should also review controlling and persuasive authority governing child welfare cases – statutes, court rules, DHS policies and secondary authority like publications issued by the State Court Administrative Office. Reviewing these materials will help the attorney determine what, if any, legal issues could be raised on appeal and the likelihood of winning. Depending on the impending appellate deadlines, the attorney may not have much time to engage in this preliminary fact-finding and legal research. But some investigation will be necessary to determine whether an appeal may be warranted.

§3.03 Client Counseling

After the attorney has had the opportunity to conduct a preliminary investigation and initial legal research, she should meet with her client to discuss whether to proceed with an appeal. In addition to reviewing the merits of potential legal arguments and the likelihood of success, the attorney should address other considerations including the costs of the appeal, how long the appeal would take and what is likely to happen on remand in the trial court if the appeal is successful. For example, a parent may not wish to appeal an adjudication decision if the only remedy after a lengthy appeal would be a new trial. Instead, the parent may simply wish to forego the appeal and begin complying immediately with her service plan to expedite the return of her children to her home. Additionally, a parent may not wish to disrupt a child's stable placement when winning on appeal may not result in the child's return to the home. Rarely will the Court of Appeals order that a child be immediately returned home after a successful appeal. But see *In re B and J*, 279 Mich App 12; 756 NW2d 234 (2008)(ordering the DHS to take immediate steps to reunify the children with the parents).

After being counseled and advised by her attorney, the client must make the decision on whether to appeal the trial court's decision. The next sections discuss the steps necessary to perfect the appeal.

§4 Filing An Appeal With The Court Of Appeals

§4.01 Appeal As Of Right

Most child welfare appeals involve orders, like a termination of parental rights ("TPR") order, which can be appealed as of right to the Court of Appeals. If counsel has been retained, the claim of appeal must be filed with the Court of Appeals within 21 days after the entry of judgment or ordered appealed from, or an order denying a motion for rehearing. MCR 7.204(A)(1). **But a claim of appeal involving a TPR must be filed within 14 days of the order terminating parental rights or an order denying a timely filed motion for a new trial, rehearing, reconsideration, or other postjudgment relief. MCR 7.204(A)(1)(c).** The claim of appeal must state in capital letters that it involves a contest as to the custody of a minor child. A claim of appeal form is available at http://courts.mi.gov/Administration/SCAO/Forms/courtforms/appeals/mc55.pdf.

The claim of appeal must be accompanied by a filing fee of $375.00 or a motion to waive fees [MCR 7.202(3); MCR 7.204(B)(2)], a copy of the order that is being appealed [MCR 7.204(C)(1)], evidence that the necessary transcripts have been ordered [MCR 7.204(C)(2)], proof of service that all parties have been served [(MCR 7.204(C)(3)], and a current register of actions from the lower court [MCR 7.204(C)(5)]. These steps are outlined in the Court of Appeals' jurisdictional checklist, which must be filed as well and is available at http://courts.mi.gov/Administration/SCAO/Forms/courtforms/appeals/juris_checklist.pdf. A copy of the claim of appeal must also be filed with the trial court along with a certificate of the court reporter stating that a transcript has been ordered and payment for it made or secured. MCR 7.204(E)(4). Additional requirements are set out in MCR 7.204.

In TPR appeals involving an indigent client, the trial court must complete these steps on behalf of parents. The court must advise parents either orally or in writing of their right to 1) appeal, 2) an attorney, 3) free transcripts and 4) a copy of the record if they are indigent. MCR 3.977(J)(1). Within 14 days, the parent must request an attorney. MCR 3.977(J)(1)(c). If the court determines the parent to be indigent, the court must then send to the Court of Appeals a claim of appeal, an order appointing counsel, a copy of the judgment being appealed, a copy of the register of actions, and a proof of service of the claim of appeal and must send the order appointing counsel to the parties and the court reporters. MCR 3.977(J)(2). The court must also order the preparation of transcripts at public expense. MCR 3.977(J)(2); see also *MLB v SLJ*, 519 US 102; 117 S Ct

555; 136 L Ed 2d 422 (1996) (finding that Due Process and Equal Protection require states to provide indigent parents with a free transcript in TPR appeals).

§4.02 Applications By Leave

In cases in which no right to appeal exists, appellate counsel must file an application for leave to appeal with the Court of Appeals within 21 days after the entry of the order or after the denial of a timely motion for rehearing. MCR 7.205(A)(1). To file an application for leave to appeal, counsel must file 5 copies of an application for leave to appeal[1] stating the date and nature of the order appealed from. The application must allege the errors committed by the trial court and the relief sought and must include a concise argument conforming to MCR 7.212(C) in support of the appellant's position on each issue. MCR 7.205(A)(1). The application should also discuss why the Court of Appeals should grant leave. Additionally, counsel must file 5 copies of the judgment or order appealed from and the register of actions and a copy of any transcripts that "substantiate the existence of the issue." MCR 7.205(B)(2); MCR 7.205(B)(4)(g). If the transcript is not ready, counsel must file a copy of the certificate of the court reporter or a statement regarding the transcript, and must file the transcript with the Court of Appeals as soon as it is ready. MCR 7.205(B)(4). The application must be accompanied by a proof of service and the filing fee of $375 or a motion to waive fees.

If counsel misses the deadline to file an application for leave to appeal, she can file a delayed application for leave to appeal. MCR 7.205(F). A delayed application can be filed up to six months after the entry of the order or the denial of a timely motion for rehearing. MCR 7.205(F)(3). <u>However, the time limit for filing a delayed application in an appeal of a termination of parental rights order is 63 days.</u> MCR 7.205(F)(6); MCR 3.993(C)(2). A delayed application must include a statement of facts explaining the reasons for the delay in addition to what is required for any application for leave to appeal.

After the Court of Appeals receives an application or delayed application for leave to appeal, it may take a number of different actions. Among other actions, it may grant or deny the application, enter a final decision, or grant other relief. MCR 7.205(D)(2). The Court of Appeals does not hold oral arguments on applications. MCR 7.205(D)(1). If the Court of Appeals grants an application, the case proceeds as an appeal of right, except that the filing of a claim of appeal is not required. The time limits for taking the other steps typically required in an appeal as of right runs from the date the order granting leave is certified. MCR 7.205(D)(3).

[1] The copy requirements referenced throughout this guide do not apply to documents that are electronically filed with the Court.

§4.03 The Record

The record in an appellate case consists of original or certified copies of papers filed in the trial court, transcripts of proceedings, and exhibits introduced into evidence. MCR 7.210. In cases in which appellate counsel has been appointed by the trial court, the trial court will prepare the initial transcript request. But appointed counsel must immediately review the register of actions to determine whether all of the transcripts have actually been ordered. In appeals involving the termination of a parent's rights, transcripts of all hearings from the beginning of the child protective proceeding must be ordered since these proceedings are continuous and evidence admitted during one hearing can be considered at any hearing. *In re LaFlure*, 48 Mich App 377; 210 NW2d 482 (1973). If counsel determines that additional transcripts must be ordered, then counsel should immediately draft a letter to the court making the request, listing the dates of hearings and the name of the court reporter. If, for whatever reason, the trial court is unwilling to order the additional transcripts, counsel should file a motion with the Court of Appeals requesting an order compelling the trial court to produce the transcripts.

In cases in which appellate counsel has been retained, counsel has the responsibility of ordering the transcripts. Counsel must order the full transcript of the relevant proceedings in the trial court from the court reporter. MCR 7.210(B)(1)(a). Again, in TPR appeals, transcripts from all of the proceedings must be ordered. Counsel must provide proof to the Court of Appeals that the transcripts have been ordered when filing the claim of appeal. MCR 7.204(C)(2).

Within 7 days after the transcripts have been ordered, the court reporter must furnish a certificate stating that the transcripts have been ordered, that payment for the transcripts has been made or secured, that they will be filed as soon as possible or have already been filed, and the estimated number of pages for each of the proceedings requested. MCR 7.210(B)(3). The court reporter must prioritize the preparation of transcripts in custody cases, but at the latest, the transcripts must be filed within 42 days after the court reporter files a certificate stating that the transcript has been ordered. MCR 7.210(B)(3)(b)(iii).

Counsel must keep track of these timeframes to ensure that unnecessary delays do not occur. If the court reporter fails to produce the transcripts within 42 days, counsel should first contact the reporter or her supervisor to identify the cause for the delay and to get an estimate as to when the transcripts will be ready. If the court reporter is not responsive, counsel should consider filing a show cause motion with the Court of Appeals to compel the immediate production of the transcripts. Note than in TPR cases, when transcripts are overdue, the Court of Appeals will generally show cause a court reporter on the court's own motion.

In addition to securing the transcripts, counsel should also ensure that she has access to both the court and confidential files at the trial court, both of which the trial court considers when making decisions in child protective proceedings. The court file typically consists of pleadings and orders in the case. The confidential file contains psychological evaluations, DHS records and other sensitive pieces of information. MCR 3.903(A)(3). While the court file is accessible to the public, the confidential file can only be accessed by people with a "legitimate interest." MCR 3.925(D). Appellate counsel certainly meets that criteria. If a trial court denies counsel the ability to review the confidential file, counsel should immediately file a motion with the Court of Appeals requesting an order granting access to the file.

§4.04 Filing Of The Brief

Counsel for the Appellant must file 5 copies of her brief within 28 days after the transcript is filed with the trial court. MCR 7.212(A)(1)(i). The brief cannot exceed 50 double-spaced pages, exclusive of tables, indexes and appendixes. MCR 7.212(B). The brief must contain a number of different parts, each of which is discussed below. A sample brief is attached to this Guide.

Stipulations to extend the time for filing the brief are not permitted in TPR cases. The time for filing the brief may be extended by the Court of Appeals on motion. MCR 7.212(A)(1)(a)(i). In custody matters, an extension of time will only be granted for good cause shown. As a general matter, good cause will be limited to unexpected events that directly impact the ability to timely file the brief. The Court of Appeals has developed a motion to extend time form which it strongly encourages counsel to use. The form is available on the court's website.

Title Page

The title page must state the full title of the case and in capital or boldface type "ORAL ARGUMENT REQUESTED" or "ORAL ARGUMENT NOT REQUESTED." MCR 7.212(C)(1). The Court of Appeals has developed a standard cover page which it strongly encourages counsel to use. IOP 7.212(C).[2] The cover page should include both the trial court and Court of Appeals case numbers.

Table of Contents

The table of contents must list the subject headings of the brief, including the principal points of argument, in order of presentation, with the numbers of the pages where they appear in the brief. MCR 7.212(C)(2).

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[2] The IOP is the Court of Appeals' Internal Operating Procedures Manual. That manual is available at http://courts.mi.gov/courts/coa/clerksoffice/pages/iop.aspx.

Index of Authorities

The index of authorities must list in alphabetical order all case authorities cited, with the complete citations including the years of decision, and all other authorities cited, with the numbers of the pages where they appear in the brief. MCR 7.212(C)(3). The attorney should divide the index into categories such as cases, constitutional provisions, statutes, court rules and other authority. Within each category, counsel should subdivide the authority as appropriate (e.g. federal cases, state cases, secondary authority, etc.). Case cites in the index need not include the pinpoint cites of particular pages within each case.

Introduction

An introduction is not required by the court rules. But it is essential in helping the appellate court grasp your argument immediately. It will help the court place everything else you write in the brief within the larger framework of your argument.

The introduction should be brief, not more than a page in most cases and even as short as a paragraph in some. It should focus on three issues: 1) what happened in the case; 2) if the law was properly applied, what should have happened; and 3) what can the appellate court do to fix the problem. Advocates should focus on these three questions throughout the brief.

Statement of the Basis of Jurisdiction

The statement of the basis of jurisdiction must identify the statute, court rule or court decision that confers jurisdiction on the Court of Appeals. In nearly all child welfare appeals, MCR 3.993 and MCR 7.203(A)(2) confer this authority.

In addition to this information, the statement must also contain the date that the order was entered and should explain how the filing of the appeal was timely as set forth in MCR 7.204 (which governs appeals as of right) or MCR 7.205 (which governs appeals by leave). MCR 7.212(C)(4)(a)(i). If counsel was appointed in the matter, the statement should list the date the request for appointment of appellate counsel was filed. MCR 7.212(C)(4)(a)(iii).

Statement of Questions Involved

The statement of questions involved must set forth the questions involved in the appeal followed by the trial court's answer or its failure to answer them. MCR 7.212(C)(5).

Nothing in the rules prohibits a multi-sentence statement of questions involved. In fact, Bryan Garner, a leading expert on brief writing, recommends that advocates use the "deep issue" method of presenting questions in a brief. Rather than simply drafting one long question with multiple subparts, Professor Garner suggests breaking up the question into separate sentences totaling no more than 75 words. Typically, this can be done in three sentences. The first sentence is the statement of the uncontested legal rule. The second sentence is the statement of facts relevant to the legal rule. And the third sentence is the final question.

Consider the difference between the old method of presenting questions and the "deep issue" method.

Old method:

Whether the DHS failed to make reasonable efforts to reunify Father and Child.

Deep issue method:

Under MCL 712A.19a, the DHS is required to make reasonable efforts to reunify parents and children and to provide timely services to this end. Here, the DHS failed to schedule parenting time between the father and his son, never provided the father with parenting classes, and never informed him of his son's mental health needs. Did the DHS fail to make reasonable efforts to reunify the father with his son?

Using the "deep issue" method allows advocates to present the key issues in the brief in a manner that clearly and succinctly highlights their arguments.

Statement of Facts

The statement of facts must be accurate and must contain all relevant facts, both good and bad. MCR 7.212(C)(6). Every fact in the statement must be supported by a citation to the record, which includes transcripts and the documents introduced into evidence at the trial court. *Id.* Counsel may not argue within the statement.

But the statement of facts must do more than present a dry, chronological rendering of the trial court proceedings. It must tell a compelling story to capture the attention of judges who read the equivalent of War and Peace every week. It must present the client as a person and tell a narrative that a judge would want to read.

To do this, counsel should consider the following questions:

- From whose perspective should the story be told? Possible perspectives include the child, the parent, the DHS, and the court.

- What labels should be used to identify the different players in the case? What messages do those labels send? For example, should the parent be referred to as "mother", "respondent" or "Ms. XXXX." Once a label is selected, it should be used consistently through the statement of facts. So if your case involves a non-offending parent, do not refer to him as non-offending parent at one point, then as an unadjudicated parent only to call him a non-respondent parent later on. The court may assume that each of these phrases means different things.

- What are the different scenes in the story? What are the different events that are critical to understanding the case? Each of these events should be separated by subheadings.

- What are the relevant facts to the story you wish to tell? If a fact is not relevant to your case, then you need not include it in the Statement of Facts. Presenting the appellate court with excessive irrelevant facts will only distract the court from the key issues in your case.

Argument Section

The argument section must begin with a statement of the point to be argued in that section. MCR 7.212(C)(7). If counsel is presenting a number of issues in her brief, then each one must begin with the statement of that issue's principal point. This statement must be either capitalized or appear in bold.

Standard of Review

For each issue that is presented in the brief, counsel must state a **standard of review**, which is the lens through which the appellate court looks at the trial court's decision. MCR 7.212(C)(7). The standard of review tells the reviewing court how much deference it must afford the lower court's decision. Because the standard of review tells the court how to look at the lower court's decision, the court must know which standard applies before it evaluates an argument.

In child welfare cases, appellate courts apply three different standards of review, depending on whether the issue being reviewed is a question of fact or law.

Clear Error - Findings of fact are reviewed under the clear error standard. MCR 2.613; *In re BZ*, 264 Mich App 286, 295; 690 NW2d 505 (2004). A decision is clearly erroneous when, "although there is evidence to support it, the reviewing court on the

entire evidence is left with the definite and firm conviction that a mistake has been made." *In re JK*, 468 Mich 202, 209-210; 661 NW2d 616 (2003).

De Novo – Constitutional questions and issues of statutory interpretation, as well as family division procedure under the court rules, are reviewed de novo. *In re Rood*, 483 Mich 73, 91; 763 NW2d 587 (2009); *Dep't of Human Svs v Cox,* 269 Mich App 533, 536; 711 NW2d 426 (2006).

Abuse of Discretion – A trial court's evidentiary rulings are reviewed under an abuse of discretion standard. *In re Gilliam*, 241 Mich App 133, 136; 613 NW2d 748 (2000). A trial court abuses its discretion when it admits inadmissible testimony or documents into evidence at a trial. *People v Katt*, 468 Mich 272; 662 NW2d 12 (2003).

Issue Preservation

Before discussing any issue, counsel must also indicate whether trial counsel preserved the issue in the proceedings. MCR 7.212(C)(7). Trial counsel can preserve an issue for appeal by objecting on the record and by clearly stating the legal basis for the objection. If the error involves the trial court's refusal to allow evidence to be introduced at a hearing, counsel should also make an offer of proof as to what the evidence is and its relevance. In some cases, counsel should also file a written motion stating the grounds for objection.

Whether trial counsel preserved the issue will affect how an appellate court will treat any errors that exist. If a constitutional error has been preserved, the beneficiary of the error must establish that it is harmless beyond a reasonable doubt. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999). But non-constitutional errors, even if preserved, will only be grounds for reversal if refusing to reverse the trial court's decision would be "inconsistent with substantial justice." MCR 2.613(A).

If an error was not preserved, appellate courts will review it under the "plain error" standard regardless of the type of the error. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999); *In re Utrera*, 281 Mich App 1, 8; 761 NW2d 253 (2008). An error satisfies this test when the error was "plain" or "obvious" and "affected the fairness, integrity, or public reputation of judicial proceedings." *Carines*, *supra* at 774.

Argument

The argument section is the crux of the brief, in which counsel must persuade the appellate court that the law requires the reversal of the trial court's decision. For each issue raised, counsel should begin with a general overview of the law and then move to the specific portion of that law that is at issue in the appeal. Once counsel reaches a specific issue, she should provide concrete examples of how the general rules have been

applied in specific cases. For example, here is a sample legal overview for an ineffective assistance of counsel claim:

> Indigent parents in child protective proceedings are entitled to court-appointed counsel, MCL 712A.17c(5); MCR 3.915(B)(1)(b), which, in turn, guarantees the right to effective assistance of counsel. *In re CR,* 250 Mich App 185, 198; 646 NW2d 506 (2001) ("[T]he principles of effective assistance of counsel developed in the context of criminal law apply by analogy in child protective proceedings."); *In re Simon*, 171 Mich App 443, 447; 431 NW2d 71 (1988) ("The right to counsel includes the right to competent counsel."); *In re Trowbridge*, 155 Mich App 785, 786; 401 NW2d 65 (1986) ("It is axiomatic that the right to counsel includes the right to competent counsel."). To prevail on an ineffective assistance of counsel claim, an appellant must show that his trial counsel's performance was deficient - that counsel's performance fell below an objective standard of reasonableness - and that the representation so prejudiced him that it denied him a fair trial. *In re CR*, *supra* at 198.
>
> In determining an objective standard of reasonableness, appellate courts may look to standards of practice established by the American Bar Association. See *Strickland v Washington*, 466 US 668, 688; 104 S Ct 2052; 80 L Ed 2d 674 ("Prevailing norms of practice as reflected in American Bar Association standards . . . are guides to determining what is reasonable."). For parents' attorneys, the standards adopted by the American Bar Association require, among other things, that attorneys "conduct a thorough and independent investigation at every stage of the proceeding," "develop a case theory and strategy to follow at hearings," "research applicable legal issues and legal arguments when appropriate," "identify, locate and prepare all witnesses," "present and cross-examine witnesses," and "request the opportunity to make opening and closing arguments." *See* ABA Standards, *supra*. Additionally, the standards mandate that parents' attorneys "be aware of unique issues an incarcerated parent faces and provide competent representation to the incarcerated client." *Id.*
>
> Here, counsel's behavior did not meet these standards . . . [insert facts here]

The argument section must contain *supporting authority* for <u>each</u> legal statement being made. If counsel relies upon unpublished cases – which are not binding on appellate courts – then she must provide a copy of the opinion to the court and opposing party. MCR 7.215(C).[3] And she must provide a citation to the record for every factual statement she makes. If she fails to cite to the relevant portions of the

[3] MCR 7.215(D) sets forth the process for appellate counsel to request publication of an authored or per curiam opinion not otherwise designated for publication.

factual record or if she does not cite legal authority to support her argument, she will have waived the legal issue. See *People v Rollins,* 207 Mich App 465, 468; 525 NW2d 484 (1994).

Once a legal rule has been stated, then counsel must apply it to the facts. Counsel cannot just state facts and let the appellate court figure out how the rule or rules apply! Her ultimate task in writing a brief is to ensure that her audience (the client, the opposing party, the judges, the judicial law clerks, other court staff) can read it once and understand exactly what it is that she wants the court to do. To do this effectively, counsel should consider using headers that summarize the argument and allow the reader to understand the complete story.

Statement of Relief

At the conclusion of the argument section, counsel must include a statement of what she would like the court to do. MCR 7.212(C)(8). This should be done precisely and concisely. She may make alternative requests, e.g., request an order reversing the lower court's decision and dismissing the case, or an order reversing the lower court's decision and ordering a new trial. Precedent will help identify permissible remedies. After concluding her brief, counsel must sign it. MCR 7.212(C)(9).

§4.05 Supplemental Authority

If new published opinions are released that affect the case after the brief has been filed and before the court has decided the case, counsel may file a one-page supplemental authority "communication" with the court. MCR 7.212(F). Counsel need not file a motion to do so. This one-page communication may not repeat arguments, and it may not raise new issues. In it, counsel may only state how the new authority affects her case.

If the new opinion is unpublished, then counsel may file a motion for leave to submit supplemental unpublished authority. In that case, if the Court grants the motion, it will instruct the attorney to submit the one-page letter under MCR 7.212(F).

§4.06 Reply Briefs

Counsel may file a reply brief responding to the appellee's arguments. MCR 7.212(G). That reply must be filed within 21 days after the appellee's brief has been served on the Appellant. In the brief, counsel may only rebut the arguments in the Appellee's brief. Counsel may not raise new arguments in the reply brief. Arguments raised for the first time in a reply brief are waived. *Check Reporting Services, Inc v Michigan National Bank-Lansing*, 191 Mich App 614, 628; 478 NW2d 893 (1991).

The reply brief is limited to 10 pages, not counting the table of contents, the index of authorities, and any appendices. Like the brief on appeal, the reply brief must also contain a table of contents and an index of authorities.

§4.07 Motion Practice

A motion is made in the Court of Appeals by filing 5 copies of the motion stating the facts and the grounds on which it is based and the relief requested along with a motion fee, unless the case involves appointed counsel or the Court of Appeals has waived the fees for the party. MCR 7.211(A). The time by which opposing counsel may respond to a motion depends on the type of motion filed. MCR 7.211(B). Specific motions are discussed below. All motions may be accompanied by briefs. MCR 7.211(A)(3).

A. **Motion For Immediate Consideration**

Child protective cases move on an expedited track at the trial court and counsel may need an immediate decision by the Court of Appeals on issues such as placement, discovery or parenting time. If counsel wants to expedite the consideration of another motion she has filed with the Court of Appeals, she must file a motion for immediate consideration stating why immediate consideration is required. MCR 7.211(C)(6). If the motion is personally served (which includes electronic service through the Court's e-filing system[4]), it may be submitted to the Court of Appeals immediately or in less than 7 days as circumstances dictate. *Id.* If the motion is served via mail, then it may not be submitted to the Court of Appeals until the first Tuesday 7 days after the date of service, unless the party served acknowledges receipt. *Id.* Opposing counsel will then have 7 days to respond unless the court orders otherwise. *Id.*

B. **Motion To Remand**

Within the time provided for filing the Appellant's brief, counsel may move to remand the matter to the trial court. MCR 7.211(C). Such a motion may be necessary to develop the factual record on an issue prior to appellate consideration of that issue. *Id.* The motion must be supported by an affidavit or offer of proof regarding the facts to be established at a hearing. If the motion is granted, further proceedings at the Court of Appeals are stayed. MCR 7.211(C)(1).

A motion to remand would be appropriate to address several issues in a child protective case. For example, if the trial court has failed to consider the child's placement with a relative when assessing whether terminating the parent's rights are in the best interests of the child, counsel should file a motion to remand to require that the

[4] For information on the COA e-filing system and requirements, please see the COA e-filing webpage.

court make such a determination. See, e.g., *In re Olive/Metts*, 297 Mich App 35, 43-44; 823 NW2d 144 (2012). Filing such a motion will expedite the resolution of the issue and may create the possibility of settling the matter. Similarly, if the trial court and the child welfare agency failed to provide notice to an Indian tribe when required to do so by either the Indian Child Welfare Act, 25 USC 1901 *et seq*., or the Michigan Indian Family Preservation Act, MCL 712B.1 *et seq.*, remanding the matter may be the correct step to give the trial court and the child welfare agency the opportunity to fix the error so that a determination may be made as to whether the child in question is Indian. See *In re Morris*, 491 Mich 81; 815 NW2d 62 (2012).

A motion to remand would also be appropriate when appellate counsel is arguing that the parent's trial counsel was ineffective. Remanding the matter would allow the parent's appellate counsel to develop the evidentiary record of the steps that the trial counsel took in the case and would give the Court of Appeals a stronger foundation to assess the adequacy of the trial counsel's representation. *People v Ginther*, 390 Mich 436, 442-442; 212 NW2d 922 (1973). Without such a hearing, the Court of Appeals would be limited to reviewing the facts already in the record.

C. **Motion To Dismiss**

Any time prior to a case being placed on the session calendar, a party can file a motion to dismiss the appeal. MCR 7.211(C)(2). A motion to dismiss is appropriate when the appeal is not within the Court of Appeals' jurisdiction, the appeal was not filed in conformity with the rules, or the appeal is moot. MCR 7.211(C)(2). Such a motion must be accompanied by a brief. MCR 7.211(A)(3).

An appeal is moot "when it presents only abstract questions of law that do not rest upon existing facts or rights." *Bureau of State Lottery,* 231 Mich App 356, 359; 586 NW2d 117 (1998). Generally, appellate courts will not reach moot issues or declare legal principles that have no practical effect on the case "unless the issue is one of public significance that is likely to recur, yet evade judicial review." *B P 7 v Federated Publications, Inc v Lansing,* 467 Mich 98, 112; 649 NW2d 383 (2002). For example, an appeal challenging the removal of a child from her home would be moot if the child has been returned to the parent during the pendency of the appeal. But exceptions to mootness may apply. See, e.g., *In re AMB* 248 Mich App 144; 640 NW2d 262 (2001); *Ryan v Ryan*, 260 Mich App 315; 677 NW2d 899 (2004)(applying exceptions to the mootness doctrine to address the merits of cases).

D. **Motion To Affirm**

After the Appellant's counsel has filed her brief, the Appellee may file a motion to affirm. MCR 7.211(C)(3). The motion must assert that either the questions presented by the Appellant are so unsubstantial that there is no need for argument or formal

submission, or that the questions sought to be reviewed were not timely or properly raised. The decision to grant a motion to affirm must be unanimous by the Court of Appeals panel. MCR 7.211(C)(3). A motion to affirm must be accompanied by a brief. MCR 7.211(A)(3).

E. **Motion For Peremptory Reversal**

Appellant's counsel may file a motion for peremptory reversal on the ground that the reversible error is so manifest that formal submission or argument is unnecessary. MCR 7.211(C)(4). The decision to grant a motion for peremptory reversal must be unanimous. *Id.* A motion for peremptory reversal must be accompanied by a brief. MCR 7.211(A)(3).

F. **Motion To Withdraw**

Appellant's counsel must withdraw from the case if she determines, after a complete review of the record, that the appeal is wholly frivolous. MCR 7.211(C)(5). The motion must identify any point the Appellant wants raised and any other matters the attorney has considered as a basis for the appeal. The brief accompanying the motion must "refer to anything in the record that might arguably support an appeal," must contain references to the record and must cite and discuss authorities that appear relevant. *Id.*

The motion must be served on the client and the other parties. *Id.* The Appellant may file an answer and serve it on her attorney. *Id.* If the Court of Appeals agrees that the appeal is "wholly frivolous," it may grant the motion and affirm the trial court's judgments. *Id.* If the Court grants the motion, Appellant's counsel must mail a copy of the transcript within 14 days to her client and file a proof of service. *Id.* If the Court finds that any arguable points exist, then it will deny the motion and the Appellant's counsel must file a brief in support of the appeal. *Id.*

§4.08 Special Considerations When Representing An Appellee

Appellee's counsel have different steps they must take in an appeal. Within 14 days after being served with a claim of appeal, counsel must enter an appearance with the Court of Appeals. MCR 7.204(G). If counsel fails to do so, then she is not entitled to notice of further proceedings until an appearance is filed. *Id.*

Once the Appellee's counsel receives the Appellant's brief, she has 21 days to file her brief. MCR 7.212(A)(2)(i). That time period may only be extended by the Court of Appeals on motion. Counsel should file a brief in every case.

In almost all respects, the Appellee's brief must conform to the same requirements as the Appellant's brief. MCR 7.212(D)(1). The Appellee must state whether the jurisdictional summary and the standard of reviews are complete and correct. MCR 7.212(D)(2). If not, counsel must provide a complete jurisdictional summary and a counter statement of the standards of review with supporting authorities. *Id.*

Appellee's counsel may also include a counter-statement of questions presented along with a counter-statement of facts. MCR 7.212(D)(3). In the counter-statement of facts, Appellee's counsel must point out the deficiencies or inaccuracies of the Appellant's statement of the facts. MCR 7.212(D)(3)(b). And like the Appellant's statement of facts, the counter-statement of facts must contain specific citations to the place where the fact that is mentioned may be found. *Id.*

In the Appellee's brief, counsel should respond to every issue raised by the Appellant. But, in a termination of parental rights case, the Court of Appeals need only find that one statutory ground for termination was valid and that termination was in the child's best interests in order to affirm the trial court's decision to terminate a parent's rights. Should the Appellant fail to challenge every statutory basis for termination in her brief, then the Appellee should consider filing a motion to affirm, unless the Appellant has challenged the best interests finding. See §4.07(D).

§4.09 Amicus Curiae Briefs

In child welfare cases involving unresolved issues of important legal significance, outside groups may be interested in filing amicus curiae briefs. Groups such as the Children's Law Section of the State Bar, the Prosecuting Attorneys Association of Michigan, the National Association of Counsel for Children, the American Civil Liberties Union and the Legal Services Association of Michigan have filed amicus curiae briefs in recent child welfare appeals.

An amicus curiae brief may be filed only on motion granted by the Court of Appeals. MCR 7.212(H)(1). The motion must be filed within 21 days after the Appellee's brief has been filed. *Id.* If the motion is granted, the order will state the date by which the brief must be filed. *Id.* Organizations may attach the amicus curiae brief with this motion.

The amicus curiae brief is limited to issues raised by the parties. MCR 7.212(H)(2). Except by court order, amicus curiae may not participate in oral argument. *Id.* Amicus curiae groups wishing to participate in oral argument can file a motion making this request.

§5 Spotting Legal Errors

§5.01 Categories Of Errors

Among the most challenging aspects of appellate advocacy is finding legal errors that warrant the reversal of a trial court's decision. Generally speaking, counsel should focus on identifying four types of errors when reviewing an appellate record.

Factual Errors – did the trial court commit clear error when determining that the facts in a specific case support the decision that was made (e.g. the termination of a parent's rights)?

Constitutional Errors – did the trial court violate the constitutional rights of the appealing party?

Statutory Errors – did the trial court violate federal or state child welfare statutes?

Evidentiary Errors – did the trial court make an evidentiary ruling in violation of the Michigan Rules of Evidence?

To be able to spot these errors, advocates must be current in their understanding of child welfare law, which is rapidly changing. In addition to periodically reviewing the Juvenile Code (MCL 712A.1 *et seq.*), the Child Protection Law (MCL 722.621 *et seq.*) and the court rules governing child protective proceedings (MCR 3.901 *et seq.*), counsel should consider joining the Children's Law Section of the State Bar, state and national child welfare listservs through organizations like the National Association of Counsel for Children and the American Bar Association's Center for Children and the Law, signing up for appellate case law updates through the Court of Appeals website, and reviewing comprehensive child welfare treatises such as Child Welfare Law and Practice, Donald N. Duquette and Ann M. Haralambie, Eds (2010). Without a solid understanding of the legal framework governing these cases, appellate advocates will struggle to spot important appellate issues.

§5.02 Questions To Help Counsel Identify Potential Errors In TPR Appeals

Similar issues often arise in termination of parental rights appeals. But one issue that cannot be raised in a TPR appeal is a challenge to the court's initial assumption of jurisdiction (i.e. challenges to the adjudication findings or plea). That issue must be raised in a direct appeal of the trial court's initial disposition order, which is appealable as of right. *In re Hatcher,* 443 Mich 426; 505 NW2d 834 (1993). However, if the trial court terminated the rights of the parent at the initial dispositional hearing, then counsel can

raise challenges regarding the adjudication since it is her first opportunity to do so. See *In re SLH*, 277 Mich App 662; 747 NW2d 547 (2008).

Below is a list of questions to help advocates think through legal errors that may exist in TPR appeals.

General

- Was the parent properly served with notice of the TPR hearing as required by MCL 712A.13 and MCR 3.920? See *In re Atkins*, 237 Mich App 249; 602 NW2d 594 (1999); *In re Brown*, 149 Mich App 529; 386 NW2d 577 (1986)(reversing TPR decision because of failures to properly serve the parents).

- Did the parent invoke his/her right to counsel as set forth in MCL 712A.17c and MCR 3.915? If so, did he/she receive the assistance of counsel at every hearing after counsel was requested? See *In re Hudson*, 483 Mich 928; 763 NW2d 618 (2009); *In re Mitchell*, 485 Mich 922; 773 NW2d 663 (2009); *In re Williams*, 286 Mich App 253; 779 NW2d 286 (2009) (reversing TPR decisions because of failures to appoint parents' counsel in a timely manner).

- Was the parent incarcerated? If so, was he/she permitted to participate at each hearing either via telephone or in person as required by MCR 2.004? See *In re Mason*, 486 Mich 142; 782 NW2d 747 (2010); *In re DMK*, 289 Mich App 246; 796 NW2d 129 (2010) (reversing TPR decisions for failures to involve the incarcerated parents in court proceedings).

- Did the trial court speak to the child in chambers without the presence of the attorneys and without the interview being transcribed? See *In re HRC*; 286 Mich App 444; 781 NW2d 105 (2009)(reversing TPR decision because trial court conducted an unrecorded in camera interview of the child without the presence of attorneys).

- Did the parent receive the effective assistance of counsel? See *In re Trowbridge*, 155 Mich App 785; 401 NW2d 65 (1986) (finding that the right to counsel includes the right to the effective assistance of counsel).

- Did the trial court apply the rules of evidence at the TPR hearing? If not, did the TPR hearing involve supplemental issues unrelated to the grounds for adjudication? See *In re Mays*, 490 Mich 993; 807

NW2d 304 (2012); *In DMK*, 289 Mich App 246; 796 NW2d 129 (2010); *In re Gilliam*, 241 Mich App 133; 613 NW2d 748 (2000) (reversing TPR decisions because trial courts erroneously admitted hearsay evidence).

- Did the trial court have any reason to believe that the child in the matter was Indian? If so, did the DHS provide notice to the tribe in compliance with the Indian Child Welfare Act, 25 USC 1901 *et seq.*, and the Michigan Indian Family Preservation Act, MCL 712B.1 *et seq.*? See *In re Morris*, 491 Mich 81; 815 NW2d 62 (2012)(detailing notice requirements when a child may be Indian).

Statutory Grounds

- Did you challenge every statutory finding made by the trial court supporting the termination of your client's rights? See *In re Trejo*, 462 Mich 341, 355-357; 612 NW2d 407 (2000) (noting that the reversal of a TPR order is warranted only if the trial court's finding under every statutory ground is clearly erroneous).

- Did the DHS make reasonable efforts to reunify your client with his/her child? See *In re Rood*, 483 Mich 73; 763 NW2d 587 (2009)(reversing TPR decision because the DHS failed to make reasonable efforts to reunify the child with her father).

- Was your client incarcerated? If so, did the DHS make reasonable efforts to eventually reunify your client with his/her child? Did the DHS provide your client with a case service plan? See *In re Mason*, 486 Mich 142; 782 NW2d 747 (2010) (reversing TPR decision because the DHS failed to make reasonable efforts to reunify a child with an incarcerated parent).

- Was your client incarcerated? If so, did he provide proper care and custody to his child by arranging for a suitable relative to care for the child? See *In re Mason*, 486 Mich 142; 782 NW2d 747 (2010) (noting that an incarcerated parent can provide proper care and custody to the child by arranging for the child to live with a relative).

- Did your client substantially comply with his/her case service plan? How did he/she demonstrate benefit from those services? See *In re JK*, 468 Mich 202; 661 NW2d 216 (2003) (noting that a parent's compliance with a service plan is evidence of her ability to

provide proper care and custody). But see *In re Gazella*, 264 Mich App 668; 692 NW2d 708 (2005)(noting that a parent must also demonstrate benefit from services in addition to complying with the service plan).

- Was your client an unadjudicated parent? If so, did the DHS demonstrate his/her parental unfitness other than through non-compliance with a service plan? See *In re Mays*, 490 Mich 993; 807 NW2d 304 (2012)(reversing TPR of an unadjudicated parent).

- Did the trial court suspend parenting time between your client and the child without a finding of harm as required by MCL 712A.13a(13)? see *In re JK*, 468 Mich 202; 661 NW2d 216 (2003) (noting that suspension of parenting time deprived the parent of the opportunity to bond with her child).

- If the child was Indian, did the trial court apply the proper legal standards?

    - Did the trial court determine, beyond a reasonable doubt, that that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child? 25 USC 1912(f).

    - Did the trial court receive testimony from a qualified expert witness in support of its decision? 25 USC 1912(f); see *In re Elliott*, 218 Mich App 196; 554 NW2d 32 (1996)(discussing the qualifications of a qualified expert witness)

    - Did the DHS provide active efforts to prevent the breakup of the Indian family? 25 USC 1912(d); see *In re JL*, 483 Mich 300; 770 NW2d 853 (2009)(discussing the active efforts requirement); *In re Roe*, 281 Mich App 88; 764 NW2d 789 (2009)(vacating TPR decision because trial court failed to make active efforts findings).

Best interests

- Was the child placed with relatives? If so, did the trial court consider the impact of the relative placement on whether the TPR was in the child's best interests? See *In re Mason*, 486 Mich 142; 782 NW2d 747 (2010); *In re Mays*, 490 Mich 993; 807 NW2d 304 (2012); *In re Olive/Metts*; 297 Mich App 35; 823 NW2d 144 (2012)(requiring

trial courts to consider the child's placement with relatives when determining whether TPR would be in the child's best interests).

- If the case involved siblings, did the trial court determine whether the TPR was in the best interests of each individual child? *In re Olive/Metts*; 297 Mich App 35; 823 NW2d 144 (2012)(requiring trial courts to determine the best interests of each child).

§6 Oral Argument

§6.01 How To Request Oral Argument

Oral argument gives appellate counsel the opportunity to persuade the appellate court of the merits of her argument, clarify positions she took in her brief, and answer questions the court may have about her case. To preserve oral argument, counsel must state "ORAL ARGUMENT REQUESTED" on the cover page of her brief. MCR 7.212(C)(1); MCR 7.212(D). If counsel fails to do this, or fails to file her brief in a timely manner, then she waives oral argument. If none of the parties are entitled to oral argument, the case will be submitted to the case call panel on the briefs without argument. MCR 7.214(A).

If counsel fails to preserve her right to oral argument, she may still file a motion requesting oral argument. MCR 7.214(A). The motion should set forth why oral argument would assist the Court of Appeals in deciding the issues in the case. If the motion is denied, counsel should still attend the oral argument, inform the Court of Appeals of her presence, and offer to answer any questions the court may have about her case.

§6.02 Logistics Of Oral Argument

The time allowed for oral argument is 30 minutes per side when both sides have preserved argument. MCR 7.214(B). When only one side has preserved argument, only 15 minutes is allotted to that side. *Id.* The time for argument may be extended by the court on motion filed at least 21 days before the session begins, or by the presiding judge during argument. *Id*

Oral arguments will take place at one of the Court of Appeals courtrooms in Detroit, Lansing, and Grand Rapids. The location of the argument usually depends on the county in which the trial court proceedings took place. Counsel will receive notice of the argument from the Court of Appeals roughly a month before the argument.

§6.03 How To Prepare For Oral Argument

Counsel should prepare extensively for any oral argument. Once the judges on the panel are known, she should become familiar with them by reading their biographies on the Court of Appeals website, researching information about them through the internet, and reviewing relevant opinions written by them which can be accessed through the Court of Appeals website and other search engines such as Lexis-Nexis and Westlaw. This background information can be crucial in helping counsel decide how to frame her arguments.

Prior to the oral argument, counsel should review the entire record in the case (documents admitted into evidence and transcripts) as well as each brief submitted to the Court of Appeals. Once she has done this and prepared an outline of how she would like to present the argument, she should schedule at least one moot court session where colleagues can evaluate her argument and give her feedback. Ideally, each moot court presentation should have 3-4 "judges" and should replicate the actual experiences at the court. Counsel should pick colleagues who have a good understanding of how the actual argument may proceed. She can either limit the moot court to the time allotted for oral arguments (typically 30 minutes per side) or can continue the argument until the panel has exhausted its questions. Many appellate advocates schedule more than one moot court session before an oral argument. By the end of a good moot court session, counsel should be able to anticipate most of the questions that will be asked of her during the actual argument.

On the day of the argument, counsel should arrive at the Court of Appeals at least thirty minutes prior to the scheduled time for argument. She should make sure that she is comfortable with the courtroom and any technology in the room. If she has never argued before the Court, she should consider watching an oral argument beforehand on a different day. The next section outlines some tips on how to present an effective oral argument.

§6.04 Tips On How To Present An Effective Oral Argument

- Start with a short and catchy introduction to capture the attention of the panel (e.g. "Reversal is required because the trial court prevented the parent's lawyer from cross-examining the Petitioner's witnesses").

- Do not start by reciting the facts of the case. The judges on the Court of Appeals are familiar with your case and will ask for background or clarifications when they need it.

- Get to the point quickly! Although the rules allow each side 30 minutes for oral argument, arguments rarely last that long.

- If a judge asks you a question calling for a "yes" or "no" answer, begin your answer with a "yes" or "no" and then make the point you'd like to make.

- If a judge asks you a hypothetical question, answer it. Don't dodge the question by simply saying that your case is different. Answer the question. Then explain how your case is different.

- Stay within the record on appeal. Don't introduce facts during the oral argument that are outside the scope of the appellate record (e.g. what is currently happening with the child).

- Don't be afraid to address bad facts. But acknowledge them and explain how those facts are not fatal to your case.

- Listen to each question carefully so that you understand what the judge is asking. If you do not understand a question, then respectfully ask the judge to clarify what she/he was asking.

- Never postpone answering a question asked by a judge. Remember that the primary purpose of an oral argument is to answer questions the judges have about your case, not for you to present a prepared speech.

- If you don't know the answer to a question, admit it and offer to research the question and provide the panel with an answer through a supplemental brief if the panel desires.

- Focus on one or two arguments in your brief. In all likelihood, you won't have time to address every argument.

- After answering a judge's question, transition back to the argument. Don't wait for another question.

- Be prepared for a cold bench – that is, an oral argument in which few or no questions are asked by the judges. If this happens, just go through your argument, ask if the judges have any questions, and if not, sit down.

- End strongly. After concluding your argument, end by succinctly stating what you would like the court to do.

§6.05 After The Oral Argument

After the oral argument, the court will issue a written decision. The time it takes for a decision to be written varies from case to case and may depend on a host of factors including the complexity of the case, whether the decision will be published and whether there is a dissenting or concurring opinion. Once counsel receives the written decision, she should immediately send a copy to her client and schedule a time to explain the decision to her.

Within 21 days of the date the opinion was issued, counsel may file a motion for reconsideration. MCR 7.215(I). The motion must include all facts, arguments, and citations to authorities in a single document and cannot exceed 10 double-spaced pages. A copy of the opinion of which reconsideration is sought must be included with the motion. *Id.*

§7 Michigan Supreme Court Practice

§7.01 Applications For Leave To Appeal

If counsel does not prevail at the Court of Appeals and the case involves issues of jurisprudential significance, she should consider filing an Application for Leave to Appeal to the Michigan Supreme Court. In TPR cases, the application must be filed within 28 days of the Court of Appeals decision or the order denying a timely filed motion for reconsideration. MCR 7.302(C). In all other cases, the application must be filed within 42 days. *Id.* Because there is no such thing as a delayed appeal to the Michigan Supreme Court, counsel must adhere to these time frames.

The Michigan Supreme Court is not an error-correcting court. That is, the Supreme Court does not take cases simply to correct mistakes made by either the trial court or the Court of Appeals. Instead, the Supreme Court only takes cases that meet specific criteria set forth in MCR 7.302(B), among which are the following:

- The issue has significant public interest and the case is one by or against the state.

- The issue involves legal principles of major significance to the state's jurisprudence.

- The decision by the Court of Appeals is clearly erroneous and will cause material injustice or the decision conflicts with a Supreme Court decision or another decision of the Court of Appeals.

Within the time frames noted above, counsel must file eight copies (1 signed) of an application for leave to appeal, prepared in conformity with MCR 7.212(B), consisting of the following sections:

- A statement identifying the judgment or order appealed from and indicating the relief sought. MCR 7.302(A)(1)(a).

- Questions presented for review related in concise terms to the facts of the case. MCR 7.302(A)(1)(b).

- Table of contents and index of authorities conforming to MCR 7.212(C)(6). MCR 7.302(A)(1)(c).

- A concise argument, conforming to MCR 7.212(C)(7), in support of the client's position on each of the stated questions. MCR 7.302(A)(1)(d).

- Any opinion, findings or judgment of the trial court relevant to the question as to which leave to appeal is sought. MCR 7.302(A)(1)(e).

- The opinion or order of the Court of Appeals. MCR 7.302(A)(1)(f).

In addition to the application, counsel must file 1) a notice for hearing that the application will be submitted to the Court on a Tuesday at least 21 days after the filing of the application, 2) proof of service that a copy of the application was served on the parties and the clerks of the Court of Appeals and the trial court and 3) the filing fee or a motion to waive fees. MCR 7.302(A)(2)(3). If the opposing party responds to the application, then counsel will have 21 days from that response to file a reply, limited to 10 pages.

§7.02 The Supreme Court's Options After Receiving An Application For Leave To Appeal

Once it receives an application for leave to appeal, the Supreme Court has several options. It may grant or deny the application. MCR 7.302(H)(1). It may enter a final decision. *Id.* Or it may issue a peremptory order. *Id.* Oral arguments are not heard on an application except by order of the Court. *Id.* If the Court orders oral argument on the application, in which the court order asks for argument before deciding whether to grant leave to appeal, each side is given 15 minutes to argue the case. Counsel should follow the tips outlined in §6.04 when handling the argument.

§7.03 Next Steps If The Supreme Court Grants An Application For Leave To Appeal

If the Supreme Court grants an application for leave to appeal, counsel will need to file her brief within 56 days after leave to appeal has been granted. MCR 7.309(B)(1). The basic requirements for all briefs (including answers, reply briefs and amicus briefs) filed with the Supreme Court are identical to the requirements for briefs filed with the Court of Appeals. MCR 7.306. In a brief in which one argument exceeds 20 pages, counsel must provide a summary of the argument. MCR 7.306(B).

But a key difference is in the creation of an appendix for the Supreme Court. MCR 7.307. The appendix, which must accompany the brief, needs to contain the following sections.

- A table of contents
- Relevant docket entries both in the trial court and the Court of Appeals
- Trial court order in question and the Court of Appeals opinion or order
- Relevant findings or opinions of the trial court
- Relevant portions of the pleadings or other parts of the record
- Relevant portions of the transcripts

Items in the Appellant's appendix must be arranged in chronological order and each page number must be followed by an "a" (in contrast with the Appellee's appendix in which each page number must be followed by a "b"). *Id.*; MCR 7.308. The parties may also stipulate to the creation of a joint appendix. MCR 7.307(B).

Specific details on how to create briefs and appendices are contained in MCR 7.306, MCR 7.307, MCR 7.308, and MCR 7.309.

After the briefs have been filed, the Court will set the case for oral argument. Each side is permitted 30 minutes to argue the case. MCR 7.315(B). Advocates should refer to §6.04 for tips on how to present the argument. Given the import of the decisions made by the Michigan Supreme Court, counsel should schedule several moot court sessions prior to the actual argument.

When counsel receives the Michigan Supreme Court's decision, she should closely review it with her client to make sure the client understands it. Counsel may file a motion for rehearing within 21 days after the Court's decision and must include reasons why the Court should modify its opinion. And in the event that the appeal involves issues dealing with the United States Constitution or federal statutes, counsel should advise her client that she has the right to file a writ of certiorari with the United States Supreme Court within 90 days of the decision or the denial of a timely filed

motion for rehearing. More information about how to file a writ of certiorari is available at http://www.supremecourt.gov/.

Helpful Books/Articles

Bryan Garner, The Winning Brief (Oxford University Press, 2004)
Bryan Garner, Legal Writing in Plain English (University of Chicago Press, 2001)
Ross Guberman, Point Made: How to Write Like the Top Advocates (Oxford University Press, 2011)
Noah Messing, The Art of Advocacy (Aspen Publishers, 2013)
Antonin Scalia and Bryan Garner, Making Your Case: The Art of Persuading Judges (Thompson West, 2008)
Hon. William W. Whitbeck, *Writing and Arguing to Win at the Court of Appeals* (Michigan Bar Journal, July 2006)

Helpful Websites

Department of Human Services Policy Manuals - http://www.mfia.state.mi.us/olmweb/ex/html/

Michigan Supreme Court –http://courts.mi.gov/Courts/MichiganSupremeCourt

Michigan Court of Appeals - http://courts.mi.gov/Courts/COA

State Court Administrative Office – Child Welfare Services - http://courts.mi.gov/Administration/SCAO/OfficesPrograms/CWS

Michigan Judicial Institute Child Protective Proceedings Benchbook - http://courts.mi.gov/education/mji/Publications/Documents/Child-Protective-Proceedings.pdf

National Association of Counsel for Children – www.naccchildlaw.org

American Bar Association's Center for Children and the Law - http://www.americanbar.org/groups/child_law.html