

**2019 Michigan Appellate Bench Bar
Conference Summary Report**

The Bench Bar Conference Committee is pleased to present the 2019 Michigan Appellate Bench Bar Summary Report. The theme for the 2019 conference was “Just the Facts: The Importance of Facts and the Appellate Record To Responsible Decision-Making and Appellate Advocacy”

The conference began with an interactive plenary panel session on issues relating to the facts and record on appeal, including topics such as correcting or expanding the record, ensuring that the record is complete, and the effective use of facts in brief-writing. After the opening plenary session, conference attendees participated in breakout sessions with justices, judges, and court staff, where they continued to discuss the various issues that the panel addressed.

At lunch on the first day of the conference, attendees had the pleasure of hearing remarks from former U.S. Solicitor General Paul Clement. Mr. Clement spoke about what he called “the Supreme Court in transition,” including the U.S. Supreme Court’s newest members, the Court’s last two terms, and important issues that the Court is expected to take up in coming terms.

The afternoon kicked off with breakout sessions on various substantive issues relating to such topics as effective brief writing and oral argument, expanding the facts on appeal, motions to remand in criminal cases, e-filing, applications for leave to appeal, and important issues facing practitioners in family law and child welfare appeals.

The first day also included a lively panel discussion on “Thinking Outside the Box: What’s Working and What Might Be Improved in Our Appellate Courts.” Topics ranged from the granting of interlocutory appeals to the standards for publishing Court of Appeals opinions to the Supreme Court’s use of peremptory orders.

Attendees wrapped up the first day at a reception and dinner where former Michigan Court of Appeals Chief Judge Michael Talbot was presented with the State Bar Appellate Practice Section’s Lifetime Achievement Award.

The second day of the conference began with a presentation on technology tools for appellate lawyers and judges, followed by more breakout sessions focused on various aspects of advocacy in the criminal, civil, family, and child welfare areas. The conference closed with our traditional Supreme Court panel discussion, with the justices providing tips on advocacy before the Court.

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

Phillip J. DeRosier
Dickinson Wright PLLC
Summary Report Editor

TABLE OF CONTENTS

I.	Plenary - Just the Facts: The Importance of Facts and the Appellate Record to Responsible Decision-Making and Appellate Advocacy	1
II.	Breakout Sessions: Just the Facts	56
A.	Drafting the Statement of Facts as Appellant	56
B.	Drafting a Counter-Statement of Facts as Appellee	57
C.	Use of Visuals in Briefs	58
D.	Use of Transcripts	58
E.	Review of video of witness testimony in lieu of transcripts	59
F.	Use of Facts at Oral Argument	59
1.	Reciting facts	59
2.	Handling factual misstatements by the opposing party	60
G.	Information Outside the Record.....	60
1.	Handling questions during oral argument about information outside the record.....	60
2.	Judicial notice	61
3.	Amicus briefs	61
4.	Motions to strike	61
H.	Settling the Record.....	62
1.	General comments	62
2.	Ordering transcripts	62
3.	Transcript production issues	63
4.	Trial exhibits	63
5.	Video and audio recordings	64
6.	Materials produced or referenced at a hearing.....	65
I.	Supplying Facts for the First Time in a Motion for Reconsideration.....	65

J.	Supplementing the Record With Subsequent Developments	66
K.	Motions to Remand.....	66
III.	DeWitt C. Holbrook Memorial Fund Luncheon—Remarks by Paul Clement.....	66
IV.	Law Practice Breakout Sessions	107
A.	Criminal	107
1.	Expanding the Facts on Appeal: Motions to Remand and Judicial Notice.....	107
a)	For what reasons are you seeking remand?	107
b)	Timing issues with dual jurisdiction in the circuit and appellate courts	108
c)	What kind of offer of proof might be sufficient to earn a remand?.....	108
d)	If the Court denies a motion to remand, what is defense bar to do?.....	109
e)	Approaches to funding issues	109
f)	What discussions should defense counsel have with prosecutor prior to having the hearing?	109
g)	Changes in the substance of post-conviction hearings post <i>People v Johnson</i>	110
h)	Miscellaneous	110
2.	Evidentiary Standards and Changes in Technology	111
3.	Offense Variables, Juvenile Lifer Resentencings, and Other Fact-Intensive Sentencing Questions	112
a)	Presentence Investigation Reports (PSIRs)	112
b)	Juvenile Life Resentencings	115
4.	Stating the Facts in the Statement of Facts	116
B.	Civil.....	118
1.	Brief Writing: Basics and Beyond	118

a)	Approaches to beginning a brief	118
b)	Introduction to the brief	118
c)	Statement of facts.....	119
d)	Standard of review and preservation of issue	119
e)	Issues and “questions presented”	120
f)	Arguments.....	120
g)	Reply briefs.....	120
h)	Typography and format.....	120
i)	Editing and proofing	121
j)	General suggestions	121
2.	Oral Argument: Basics and Beyond	122
a)	Preparing for Oral Argument.....	122
b)	Pre-argument questions from the panel	122
c)	Correcting misstatements regarding the record	122
d)	During the argument	123
e)	Facts unknown or outside the record	123
f)	Knowing when to sit down	124
g)	Michigan Supreme Court arguments	124
3.	E-Filing Nuts and Bolts	124
a)	Case initiation and service	124
b)	New appendix rule (MCR 7.212(J))	125
c)	Defect corrections	125
d)	Record availability	125
4.	Taking It Up – Applications and Appeals in the Supreme Court	125
a)	Timelines for applications for leave to appeal.....	125

b)	Processing of applications for leave to appeal	126
c)	Commissioners' review	126
d)	Consideration by the court	126
e)	Factors that increase the likelihood of review	127
f)	Contents of an application for leave to appeal.....	127
g)	Amicus briefs	127
5.	Fast Action – Motions, Emergencies and Unusual Cases.....	128
a)	Emergency appeals	128
b)	Motions for immediate consideration	128
c)	Motions for stay	128
d)	Motions for expedited review	129
e)	Motions for peremptory reversal:	129
f)	Applications for leave to appeal	130
6.	Dealing With the Facts and the Record	130
a)	Record presentation	130
b)	Exhibits and evidence	130
c)	Briefing issues.....	130
d)	Record issues	131
e)	Presenting the facts	131
C.	Family	131
1.	The Good, the Bad, and the Ugly of Family Law Appellate Jurisdiction.....	131
2.	What's Your Standard (of Review)?.....	133
D.	Child Welfare.....	136
1.	Show Me the Money!.....	136

2.	Keeping Up with The Joneses (Cases You Should Know).....	139
E.	Michigan Supreme Court Mini-Oral Arguments (MOAs) - How Are They Working?.....	147
1.	History of MOAAs	147
2.	MOAA trends.....	148
3.	Application practice in light of MOAAs	148
4.	Practitioner approaches to supplemental briefs on MOAA	148
5.	MOAA arguments.....	149
6.	Court views on MOAA.....	150
7.	Suggestions and comments in response to request for comment on MOAA process	151
V.	Plenary – Thinking Outside the Box: What’s Working and What Might Be Improved in Our Appellate Courts	152
VI.	Plenary – Technology and the Record	228
VII.	Plenary—Supreme Court Practice Tips	268
VIII.	Potential Policy or Rule Changes Raised By Conference Participants.....	319

I. Plenary - Just the Facts: The Importance of Facts and the Appellate Record to Responsible Decision-Making and Appellate Advocacy

MICHIGAN APPELLATE BENCH BAR CONFERENCE

March 28, 2019

9:26 a.m.

The Inn at St. John's

Conference Center

44045 5 Mile Road

Plymouth, Michigan 48170

JUST THE FACTS:

The Importance of Facts and the Appellate Record to
Responsible Decision-Making and Appellate Advocacy

MODERATOR:

Mr. Phillip DeRosier

PANELISTS:

Chief Justice Bridget Mary McCormack

Chief Judge Christopher Murray

Judge James Redford

Ms. Julie Isola Ruecke

Mr. Jerome Zimmer, Jr.

REPORTED BY:

Ms. Leah M. Witt, CSR-8825

Certified Shorthand Reporter

(248)644-8888

MR. DeROSIER: Welcome. Good morning.

Welcome to our opening plenary session. As Mary said, I'm Phil DeRosier. I have an excellent panel with me this morning. We're going to discuss a bunch of topics related to our conference theme, which is up on the screen, "Just

the Facts: The Importance of Facts and the Appellate Record to Responsible Decision-Making and Appellate Advocacy."

After that we'll take a short break, and then we'll head into the breakout sessions where everybody will get a chance to continue the discussion in smaller groups that will meet. Try to do our best to make sure that court staff, the justices, and judges are evenly distributed among the rooms, but it will be an opportunity to discuss in a more intimate setting some of the topics that we go over during our panel discussion.

So let me start out by introducing our panel. Joining me are -- and I'll just start with Chief Judge Murray because he's closest. Chief Judge Chris Murray from the Court of Appeals; Judge Jim Redford, also from the Court of Appeals; Chief Justice Bridget McCormack, of course from the Michigan Supreme Court; Julie Ruecke, research director of the Court of Appeals; and Jerry Zimmer, chief clerk of the Court of Appeals.

One of the other things that we're going to try to do during this plenary session is, we have a couple of hypothetical questions that we're going to ask a little bit later. We're going to try to incorporate those into the discussion. Using the conference app on your phone, you'll have an opportunity to cast your own

vote about what you think the answer is, and then we'll get the panel's view.

So what I thought I would do just for a second is kind of walk everybody through -- hopefully everybody had a chance to download the app. If you haven't, as Mary said, this is the time to do it, and if you need help, Tony and Bear can give you a hand with that.

So basically what you're going to want to do in the app is just go to your schedule, and once you're in your schedule, it should automatically show today. You'll want to scroll to this plenary session. When you click on the plenary session, you're going to scroll down a little bit, and you'll see a section called Live Polls. And there will be two questions under the Live Polls, and what you'll do is you'll click on each of those questions.

It will show you the question, and I'll also, when the time is right, display it up on the screen. And then, you know, vote, tell us what you think the answer is, and then once everybody's had a chance to do that, we'll display the results up on the screen and, like I said, we'll get feedback from the panel. So, you know, if you want to go ahead and take a look at the questions now and think about them, great. You don't have to vote

now, you can wait until we get to them, however you want to do it.

The last thing I want to mention is, we are going to save time at the end for questions from you. There are note cards on the tables, so if you'd like to at any point jot down a question, my colleague, Mary, will be up and about collecting them, and we'll save probably 15, 20 minutes at the end, and she'll go through the questions and, you know, you'll get a chance to get some of your questions answered.

So with that, let's go ahead and get started. I sort of have broken up the discussion into some different sections. The first area that I thought we could cover is preserving issues in the -- factual issues in the trial court.

My first question for the panel goes to a situation that, at least in my experience, can come up in civil cases at least. If facts or evidence are not included in a party's summary disposition briefing but are brought to the trial court's attention at the hearing on the motion, is that sufficient for those facts or evidence to be considered on appeal?

So again, nothing mentioned in the brief about them, but you go to the hearing and the lawyer mentions the facts, mentions the evidence during the hearing. Is that sufficient for purposes of appeal, or does it need

to be in the brief in your view? And so why don't we start with Chief Judge Murray. What do you think about that, Judge Murray?

CHIEF JUDGE MURRAY: My thought would be that it's probably not adequately preserved because I think on the summary disposition rules you have to point it out, the evidence in your brief, and it has to be in the record. And then when it comes on appeal, if it hasn't been -- if they haven't done that and they just have a transcript from the motion hearing saying, you know, Plaintiff testified to this, Defendant testified to that, we have no evidence of that. So my thought would be that it probably would not be considered.

MR. DeROSIER: Okay. Thanks, Judge. Judge Redford, what do you think?

JUDGE REDFORD: Thank you, Phil. And I asked why I was on this panel since I've been an appellate judge for about three and a half minutes, but they said they wanted somebody with new experience. So with very little experience, and I apologize for that, I agree with the chief judge of my court. No, but I agree.

CHIEF JUSTICE McCORMACK: What if I disagree with him?

JUDGE REDFORD: Well, you're not going to let

me know for 18 months. Usually. But I agree, it has to be part of the record. It can be referenced, but it's a relatively simple process to make it part of the record, so it's got to be there for the court to be able to consider it at the appellate level.

MR. DeROSIER: Okay. Thanks. That's a good segue then to Chief Justice McCormack. We'll see if she agrees or disagrees.

CHIEF JUSTICE McCORMACK: I don't actually disagree, although it's -- I might sound like a broken record. I think what's interesting about this topic is the fundamental principle that underlies kind of what the record on appeal is, and what appellate courts can do with it isn't actually spelled out anywhere, right?

I mean, we have rules about what the record on appeal is and the assumption is we're supposed to consider what's in that record, but the fundamental principle that underlies that assumption is important about our role in the system, and it's not really spelled out, so I think there's a lot of interesting stuff happening on this topic.

MR. DeROSIER: Thank you. So, Julie, from the perspective of the director of research. Julie, of course, your job is to supervise, ultimately, all of the prehearing attorneys and their work. Do you have anything that you want to add about the topic?

MS. RUECKE: No. I mean, I'm in agreement with the chief judge, Chief Justice McCormack, and Judge Redford. The only thing I would point out -- I mean, it's been a long time since I practiced law, but how chaotic it could get at a motion hearing when the moving party says, "Oh, by the way, let me read this additional testimony."

And then the nonmoving party is either at a disadvantage because they're not expecting that, and then but what if they bring up and start quoting testimony and back and forth, and then we have none of that physically in our record to look at. So what our research attorneys would do is not consider the statements that are made at the motion hearing as part of the record.

MR. DeROSIER: Okay. That's interesting. Thanks, Julie. So my next question -- and this, again, it relates to deposition testimony in particular and preserving the record when it comes to that testimony. I know I get a lot of questions from my colleagues about when they're preparing their lower court briefing should they attach the entirety of the deposition, or should they only attach the pages that are relevant to, you know, the argument that they're making. And so, you know, the problem can be, of course, if you miss pages or if there's something that's important that you discover later on, it creates a record preservation problem.

So my question is, what do you think is a best practice, from your perspective as judges and court staff, as far as should people consider attaching the entire deposition transcript, or do you think it's better to only attach the pages? Because we realize there's a balancing of trying to be thorough, but at the same time not overwhelming you with paper. Chief Judge Murray, what do you think about that?

CHIEF JUDGE MURRAY: Well, I think -- my guess is everybody here would say file the whole transcript because when you aren't dealing with it in the trial court and you have to deal with it on appeal, it gives you some more leeway to make some more arguments that might have not been made. But, you know, I don't have a preference.

I'm not the type of person -- when I was practicing, I would just attach the relevant pages of the transcript and I would expect the other side to submit what they thought was, you know, evidence that would create a question of fact or what have you.

But I -- you know, I'm the type of person, I read what is submitted, and if Defendant has an appeal brief and they attach 15 pages of the transcript and then the plaintiff comes in and says, "You know what, that's mischaracterizing the testimony," well, then

they'll attach the testimony that shows it's mischaracterized. But I'm not going to read the whole deposition by any means just to get a feel for the testimony.

MR. DeROSIER: As kind of a slight follow-up to that, what is your thought on whether it's enough to have an entire deposition in the lower court filed, let's say, and maybe not necessarily attached to a particular, say, again, a summary disposition brief.

What's your thought on that? Is it enough that it's in the record somewhere, or does it need to be brought to the trial court's attention?

CHIEF JUDGE MURRAY: Well, I think it needs to be brought to the trial court's attention. I think it was a 2009 case I think, Barnard Manufacturing or something like that, that Judge Mike Kelly wrote, and I think it specifies that, like a lot of federal cases say, you have to point out the record to the trial court.

So the fact that you have the whole deposition there isn't really going to help you necessarily on appeal because if you didn't point it out to the trial court, that was your obligation to do it at that time and not later on to try and make a better argument.

MR. DeROSIER: Judge Redford, from your perspective, I know you were a trial court judge for many years --

JUDGE REDFORD: I was.

MR. DeROSIER: -- and now you're on the Court of Appeals. What do you think about that issue?

JUDGE REDFORD: Thank you, Phil. As a trial judge, I found it most helpful to have, for depositions, the entire transcript in a four-page mini with the highlight -- with the sections that are important highlighted, and so -- but obviously you'd have to serve that on opposing counsel as well.

But that really -- it would focus me and my clerk into where we needed to go, but it would give me the opportunity to review the entirety of the deposition transcript, which I found very helpful. And the same thing could be applied to lengthy contracts and things along those lines, whether it's a shareholder agreement or an insurance contract. Using the highlight feature, it's very helpful.

And the reason is obvious. All of you are extremely busy, but the courts likewise are busy. On a given summary disposition -- excuse me -- or motion hearing day, the circuit court is going to have somewhere between probably 15 and 25 motions. Five of them could very well be dispositive.

In the Court of Appeals there are 5,000 cases per year. We're working extremely hard to be prepared, but to the extent you can help us do that, it really helps to get to the right answer.

MR. DeROSIER: Chief Justice McCormack, anything you want to add?

CHIEF JUSTICE McCORMACK: No, I think they both got it. Good advocacy, obviously, I think argues for highlighting and pointing out exactly what it is that your argument is primarily focused on. Having said that, you know, good advocacy also means including the rest of it so that it's there in case you need to argue from it. So both? How about both?

MR. DeROSIER: Julie, anything from the research --

MS. RUECKE: No, there's really -- MR.

DeROSIER: -- staff?

MS. RUECKE: -- nothing more to add, other than, you know, sometimes I know when people attach only certain portions of the transcript, you sort of don't have it entirely in context because they left out the previous page that seems -- you want to see what that was, but I guess that would be the burden on the response to put whatever testimony the movant is relying on to put it in better context than what the moving party is representing that it is.

Again, I'll just reiterate that the research attorneys at the Court of Appeals are simply going to look at the testimony pages that were presented to the trial court and highlighted and the responsive plea in all the pleadings.

MR. DeROSIER: Yeah. So you just got to make sure it's in there.

MS. RUECKE: Right.

MR. DeROSIER: Absolutely. All right. Well, let's turn to another topic, and I'll mix things up a little bit and I won't go to Chief Judge Murray first this time. But this is another issue that seems to come up quite often, and that is get an adverse decision in the trial court, thinking about filing a motion for reconsideration, and realize there's some fact piece of evidence that you wish would have been before the trial court when the court made its decision initially.

What's your view on using a motion for reconsideration to raise additional facts or evidence? Maybe if we can start with Judge Redford, put you on the spot on this one first.

JUDGE REDFORD: Thanks. With my vast universe of experience in the motion docket. The remedy is available to expand the record, and if that's appropriate, it's -- you should file that motion. I think it's -- you know, we have a case call docket that every judge is assigned for

11 months out of the year, and we have a motion docket that we have -- I don't know, Chief, what, between 5 and 7 months we have that?

CHIEF JUDGE MURRAY: Yeah, seven.

JUDGE REDFORD: Seven months. So every Tuesday we're looking at motions. If you're in the motion docket and you're churning through -- and when I say churning, I don't mean it pejoratively. You're working through a lot of motions. So if it's important, if it's substantive, tell us why, tell us why it's important, tell us how you propose that we expand the record.

MR. DeROSIER: How about from your perspective in your years of service as a trial court judge? So I'm thinking of the usual situation. I know I'm talking about summary disposition a lot, but party has summary disposition granted and, you know, they're going to take an appeal. It occurs to the lawyer that there were some things that maybe could have been or should have been raised factually or maybe there's a piece of deposition testimony that wasn't included in the briefing.

Is that motion for reconsideration in front of the trial court, do you think, an appropriate time to raise that new evidence, or do you feel like once the decision was made, reconsideration at that level is too late?

JUDGE REDFORD: Phil, are you saying a 2.119(F), a motion for full reconsideration?

MR. DeROSIER: I'm sorry, Judge. Yes, I'm thinking of a motion for reconsideration at the trial court level, so with an eye toward people that are trying to make sure that everything is in the record, if you will, for purposes of appeal. But the question being, is it fair, is it appropriate to do that once the trial court has made its decision initially?

JUDGE REDFORD: For litigants who appeared before me when I was a circuit judge, they know I rarely granted 2.119(F) motions, and it's because it's either knew or under reasonable diligence should have known. So unless something has happened in the intervening time between when the decision was made and your motion for reconsideration that truly is unanticipatable, I'm not sure you're going to get relief.

However, if the goal is you want to have as complete a record, maybe you make a motion to supplement the record. I'm not -- I don't have a definitive answer. I'm curious what the chief says.

MR. DeROSIER: Yeah. Chief Justice?

CHIEF JUSTICE McCORMACK: I can't say any reason why you wouldn't do that, I mean, especially if what you're thinking about is your appeal. You want to be able

to say to the appellate court that you gave the trial court every opportunity to fix the problem. You know, otherwise, I think you'll be -- you'd have to worry about waiver. So I think you have to bring it to the trial court's attention.

JUDGE REDFORD: Do it by motion for reconsideration or motion to expand the record?

CHIEF JUSTICE McCORMACK: Well, I would do all of the above, but I would certainly do a motion for reconsideration so I could say to the appellate court we gave the trial court a chance to fix this, it didn't, so that's why we're here.

MR. DeROSIER: Yeah, kind of a last resort. Chief Judge Murray, you look like you've got something.

CHIEF JUDGE MURRAY: Well, I mean, I agree. Certainly as a practitioner you do it because you're trying to save the case. But, you know, I mean, our cases are -- there's a lot of them. It's whatever was presented to the trial court at the time the decision was made and -- you know, so if you didn't have it at that point, then you're going to say, well, here it is on reconsideration, well, then, it's obviously a tougher standard of abuse of discretion and why didn't you provide it before? So, you know, I would certainly do it if I was a lawyer, but, you know, it's going to be an uphill battle.

MR. DeROSIER: Yeah, asking the question whether it's appropriate eventually and whether it's going to be considered is really the tall order.

Julie, in terms of the research attorneys, you know, what do you tell them when these kinds of questions come up about, oh, well, this evidence was not presented initially, it was in the motion for reconsideration? Is that something that comes up or that, you know, you guys talk about?

MS. RUECKE: We don't talk about it a lot. MR.

DeROSIER: Hopefully it doesn't happen a lot.

MS. RUECKE: No. But I would say the research attorneys, to whatever extent if there's a motion for reconsideration filed, it attaches additional facts, and the research attorney uses their best judgment that it's necessary for our judges to know about this motion, they would put that in a report.

Whether the judges, you know, choose to consider that additional evidence, it's up to them. I mean, if you can't file a motion for reconsideration raising additional arguments, you know, there's case law that says that.

So, you know, as far as factual evidence, it just -- my own opinion is it should have been in the motion or in the response. But certainly if it's

brought up in a motion for reconsideration, the research attorney feels it's necessary to discuss the motion for reconsideration, they'll bring that to the judge's attention in their report.

MR. DeROSIER: Very good. Thank you. So why don't we turn next to a different topic. Call this one sort of case processing, preparing the record on appeal, and I thought that to start out, it might be helpful for people to have an understanding of how cases are currently processed in the Court of Appeals in just sort of a general broad sense. Chief Judge Murray, is that something that you could help us out with?

CHIEF JUDGE MURRAY: I hope so. If not, I'm in a lot of trouble. Anyway, yeah, I mean, it's pretty routine. Every month, let's say just for an example, we have 30 cases a panel. Each judge gets the ten cases assigned to him or her.

One of those cases is what we call a no-report case, and so that judge is responsible for circulating a bench memo, hopefully a couple weeks before the case calls, and then analyzes everything like our research reports do. And then for the remaining nine cases, it comes with a research report from either a prehearing or senior research.

And the only twist to that I guess is we have a 3- to 11-day evaluation I guess is what we call it, and if a judge gets a case, a no-report case, that is on upward -- the higher level, then they might get a couple cases last with the reports that make up for the difficulty level.

And then for our judges who are on the court of claims, they get a reduction every month to recognize the fact that they are also serving as trial court judges. So that's -- it's the same for everybody each month, and any of the more difficult cases -- or I shouldn't say necessarily difficult, but more record-wise goes to our senior research.

MR. DeROSIER: Okay. As opposed to through the regular prehearing attorneys.

CHIEF JUDGE MURRAY: Yeah. Well, prehearing, you know, because we all know -- I mean, a lot of you here were prehearing attorneys. They get the less difficult, less fact-intensive cases, especially to start, of course, and then as time goes on, they may get some more difficult cases. But for the most part, the cases that either have a massive record or massive amounts of issues go through senior research.

MR. DeROSIER: Okay. That's very helpful. I appreciate that. So now I'm going to see if I can get Jerry into the discussion here.

MR. ZIMMER: Oh, boy.

MR. DeROSIER: So, Jerry, under the Court Rules, of course, it's the appellant's responsibility generally to order the entire transcript, right? So that means, as the court rules state, every hearing that took place during the course of the case.

So my question for you is, who ultimately enforces that transcript requirement? Does the court, you know, carefully assess whether all of the transcripts are in there, or does it depend on the appellee to point out if there are missing transcripts? How does that work from the clerk's office perspective?

MR. ZIMMER: Well, first of all -- is that on? First of all, when the claim of appeal comes in, you -- the Court Rules require that you have some indication of that you've ordered the transcripts or that there's no transcript to be prepared.

So we will check the claim of appeal for that and defect the filer if they fail to have some indication like that. They'll send one of our love notes to you that says, you know, if you don't give us that indication within 21 days I think it is, that we will submit the case for dismissal.

So once we get to that point, we take it -- take you at your word, whatever transcripts you've ordered, that that's the entire transcript. Unless the

other side comes in to, you know, challenge that, we won't scrutinize the records or the ROA to find out whether there's more hearings to be transcribed.

MR. DeROSIER: Okay. All right. That's helpful to know. So the people in the clerk's office don't scrutinize the lower court register and look at possible hearings and raise questions. They rely on the parties to vet that.

MR. ZIMMER: That's right. And with regard to enforcement, we do a lot of chasing transcripts I think in the clerk's office. That's kind of the beginning part of the appeal. We want to make sure the transcripts are being worked on, that they're being filed, that we get the notices that they have been filed with the trial court.

Attorneys who practice in our court probably have seen our letters that come out that if you don't meet those deadlines, we send letters that say, you know, you need to get that filed or we're going to dismiss your case. So that I think is an aspect of the enforcement.

MR. DeROSIER: Are there, from your perspective, any, I guess, exceptions to the requirement of ordering all the transcripts? If somebody points out that a transcript is missing, is it just a matter of citing to the rule and saying a transcript has to be ordered, or, you know, are there ever any situations

where somebody has tried to apply an explanation about maybe why a particular transcript isn't necessary or relevant?

MR. ZIMMER: It doesn't happen all that frequently, but appellees will come in and maybe they'll file a motion to compel the other side to produce more of the transcript, whatever they're missing --

MR. DeROSIER: Okay.

MR. ZIMMER: -- and we will process that motion and send it to a judge. You know, typically if they can make that case, then we will order that the transcript be prepared and it will delay your appeal. Beyond that, we don't see that a whole lot.

Generally it works that, particularly in civil cases, that whatever the attorney orders, the case generally goes forward with that. At times it will get to the research or the judicial offices and they find that they're missing a transcript, and they will contact the clerk's office, and we will contact the appellant to order that transcript.

Again, your case will be set aside then. You know, you may lose a month, two months of time on your case because you didn't order that transcript right away. So I think those are the methods we use.

MR. DeROSIER: Okay. Thank you. So kind of

relatedly, then, in terms of preparing of the record on appeal, I know I've struggled at times with trial exhibits trying to, you know, make sure you collect them from the trial court, you have them, they're assembled, getting them to the Court of Appeals.

Is there, I don't know, a best practice or any tips that you can offer people for how to go through that process of making sure that all those trial exhibits get to you guys?

MR. ZIMMER: Well, I think first it's important to note that the Court Rule requires that you -- within 21 days of filing your claim of appeal, you are supposed to file with the trial court any exhibits that you had admitted or presented at trial.

We hear from attorneys all the time that trial courts often won't take those, so I think if you're in that position -- so first of all, the best way to get them to us is to file them with the trial court, if they will take them. Then when the record comes to us, the exhibits will be included with the record.

Again, I don't think that happens all the time, and when it doesn't, I guess the next best thing would be to make it part of your appendix on your appeal or your appeal brief. In fact, our new appendix rule requires

that you include in the appendix any exhibit that's relevant to your -- the issues you're raising on appeal. So that would be another way of getting those in here. In a required way, in fact.

We will also see, you know, if there -- at times people will simply try to add to the record. They will present their exhibits to us, file them. We will take them. I think the best way to do that is to file with the exhibits a cover letter that tells us what they are, what case they go to. And so once we get that, we will put it with the record, and once that record goes to the judges, it will include those exhibits.

MR. DeROSIER: Okay. Well, I'm glad you mentioned that because I was going to ask you whether it's ever okay for parties as sort of a last resort to file trial exhibits directly with you, and I guess I assume as long as the other side doesn't object and everybody agrees that they're the trial exhibits, that it sounds like it's not a problem then.

MR. ZIMMER: Yeah, we get them on a regular basis that way.

MR. DeROSIER: Okay.

JUDGE REDFORD: Jerry, in both civil and criminal cases or --

MR. ZIMMER: That we take them?

JUDGE REDFORD: Is there any consistency as far as it's harder for us to get the exhibits in a civil case or it's harder to get them in a criminal case? Just wondering.

MR. ZIMMER: I don't know of any distinction between the two.

MR. DeROSIER: Okay. Now, so I realize we've been talking a lot about probably some things that apply across the board, but a lot of things relating to civil cases. This next question I think of as being -- I know I haven't dealt with it in my own practice. I primarily handle civil appeals. I think of it coming up more often in criminal cases. But motions to remand for additional factual development.

So a case gets up to the Court of Appeals, there's some fact that's necessary -- I don't know if it's maybe a criminal sentencing issue or whatnot -- but my question for the panel, and maybe we can start with Chief Judge Murray on this one, when do you see those motions to remand for additional factual development, and do you have any tips about how best to go about seeking that remand if you realize there is an important fact that needs to be in the record?

CHIEF JUDGE MURRAY: Well, the only ones I can really think of are motions for Ginther hearings in criminal cases and on sentencing issues. And really, I'm

sort of stating the obvious, is the best way to do it is to really not just make an assertion like on these remands for Ginther hearings and make assertions without any support in the record at all or even an affidavit submitted after the fact explaining really why there is some evidence there that really might make a difference as to what the lawyer failed to do or failed to consider.

And, again, the other, I think, frequent thing we see that results in a denial is simply that there are facts in the record already on the issue that's being raised, and so there's no reason to send it back down. So really that motion is probably just being made to preserve it for whatever reason, but it's not going to go very far.

MR. DeROSIER: Okay. Appreciate that. Judge Redford, anything you want to add on motions to remand? I don't know how often you see them.

JUDGE REDFORD: Yeah, same. And, you know, just, obviously, if you have to make the motion in a Ginther situation, seek the relief of the trial court first, and then, you know, if you haven't been given that relief, then that comes to the court. And like the chief said, you know, why is one warranted? That's the critical issue. And be as succinct and brief and specific as possible.

MR. DeROSIER: Okay. Thank you. Why don't we turn next to -- I consider this sort of the meat and potatoes of briefing, but, again, you know, focused on our theme of the facts and how to provide a persuasive presentation of the facts.

One thing I wanted to get people's views on is, in the statement of facts, what do you think about should you include all of the facts, should you carefully select and present only the facts that relate to the issues that you plan on raising on appeal? What are your thoughts about an effective statement of facts from sort of that broad, broad view? And maybe, Chief Justice McCormack, we can start with you on this one if you don't mind.

CHIEF JUSTICE McCORMACK: Absolutely. This is obviously one of -- I mean, it's kind of an art, not a science. But, you know, my answer is the best briefs draw my attention to the facts that matter, but certainly don't hide the ball about facts that might cut the other way.

I mean, you want to both tell a compelling story, and there's no doubt that your facts are the place that you do that, but I also want to believe you're an honest broker. So I don't want to start reading the other brief and find out that there's some really important fact to the question that you did not bring to

my attention and I just read your whole brief, because then I'm a little bit worried about you.

MR. DeROSIER: How much advocacy are you okay with in the statement of facts?

CHIEF JUSTICE McCORMACK: I think you can present your facts in a straightforward way and still be an advocate. You're an advocate. You should be an advocate. You should be, you know, telling the story of your case through your facts. So I do think you have to be an advocate, just an honest broker advocate.

MR. DeROSIER: Judge Redford, what do you think? Anything you want to add on the facts, statement of facts?

JUDGE REDFORD: Brevity is the soul of wit. I think, yes, give us the facts. I want to know what the whole situation is, but you don't have to, you know, "and the Lord created on the first day and then on the second day." We don't need the book of Genesis.

But, please, you know, tell us what it is. If they're facts that are of a general nature, do that in a sort of "this case is about" or however you choose to write it yourself. And then as the chief justice said, what are the specific facts that are most relevant to you and to your case?

And the other thing my mother used to always say, you know, always say please and thank you. Be

polite and don't be discourteous to the other side, other counsel or the other side, no matter how much you might want to. And if you do write it that way, then just, you know, pull it from your word processor, strike that paragraph before you submit it, you know, just because that's not going to help advance the cause, in my opinion.

MR. DeROSIER: Thank you. Chief Judge Murray, anything you want to add?

CHIEF JUDGE MURRAY: Well, just, I mean, it does depend a little bit the context. I mean, if you're handling a termination of parental rights kind of case, then, you know, you do need to know the whole story because that's when it's really an issue. But in the civil context, of course, just what's related to the material facts.

And as far as advocacy in the statement of facts, you know, it's a hard one to define I think, because I think like Chief Justice McCormack was saying, I mean, you're an advocate, you need to be persuasive, and you need to tell the story for your client, and you do that in a way to frame it so that when you get to the argument section you go, oh, yeah, that makes sense.

But you don't want to cross a line I don't think, at least from my perspective, is where you start

really, you know, "this is my story and then the other side is lying about this or misrepresenting this." That's your argument section, you know? You can tell a full story without being -- I guess advocating as opposed to persuasive writing.

MR. DeROSIER: Okay. Yeah, that makes sense. I appreciate that. Now, another issue that can come up sometimes is you might have a case involving what we call salacious facts. That seems to be the label placed on it. So maybe a criminal case with some graphic violence that's involved, or maybe it's a race or gender discrimination case with, you know, very offensive language.

What does the panel think about the best way to address cases that involve -- and I'm talking about where it is central to the decision in the case, either for sentencing to understand maybe the nature of the offense or if it's a specific phrase that was used, like I said, in a termination case. What's the best way to handle addressing those kinds of things in briefs? Chief Justice McCormack, I'm going to start with you on that.

CHIEF JUSTICE McCORMACK: Give it to me straight. I can handle it. I don't really -- I sort of feel like it's -- if your premise is it's important, give it to me. I can take it.

MR. DeROSIER: Okay. Pretty straightforward.

Judge Murray, what do you think?

CHIEF JUDGE MURRAY: Totally agree. MR.

DeROSIER: Judge Redford?

JUDGE REDFORD: Concur. And as was stated in the record.

MR. DeROSIER: Yeah. So don't be shy.

JUDGE REDFORD: Use quotations.

MR. DeROSIER: Now, another thing that, you know, hopefully doesn't come up too often, but does, and I think it was mentioned, when a party says something in the brief, it's either a misstatement of something or maybe it's a factual statement that's not based on anything that's in the record, if you're either the appellee responding to the appellant doing that or if you're the appellant, the appellee does it, you have your reply brief, that's an opportunity to address that kind of situation.

What's your advice on how to best deal with addressing a situation where the other party is taking liberty with the record, if you will? What do you think, Judge Redford, in your early, early experience?

JUDGE REDFORD: In my vast, vast experience. I would say, "Opposing counsel has indicated X, I respectfully disagree because Y," and then I would state factually what -- you know, in the record what it is that suggests that they were misinformed. I would almost -- I

can't imagine a scenario where I would say that they intentionally lied. I don't know. It could have been a mistake.

I'm assuming that my sister and brother counsel on the other side are honest brokers like I'm trying to be, and I'd be as respectful as I could of the other side but point out to the court here's why I think that it's not a correct statement of what the record is, and here's what the record is.

MR. DeROSIER: So maybe try to -- so, you know, don't accuse, try to keep the language civil, but be factual and specific about what is, in fact, a misstatement.

JUDGE REDFORD: Yes.

MR. DeROSIER: Okay. Chief Judge Murray, what do you think? Anything you want to add to that?

CHIEF JUDGE MURRAY: Yeah. I think, again, it depends if it's -- and I think maybe Jerry could say, if someone submits a brief that has no citation in the record in the entire statement of facts, which does happen, I think you do some kind of cursory review of that.

MR. ZIMMER: Yes, we do.

CHIEF JUDGE MURRAY: Yeah. So that would be a motion to strike, you know. I mean, this is totally

nonconforming. But if it's less than that, I would say the appellee's brief and, you know, deal with it that way.

MR. DeROSIER: Okay. Thank you. Julie, in terms of the research division, you know, are there specific instructions that the research attorneys get about how to, you know, deal with trying to flag those things for the judges and point those out in the reports or anything else that you want to add?

MS. RUECKE: Well, when the research attorney gets a case, obviously they're going to read the briefs, they're going to read the statement of facts from the appellant's perspective and the appellee's perspective.

But what we tell them to do is prepare the statement of facts neutrally based on the lower court record, not something stated in a brief, so when a judge is reading a report, if not every sentence, every other sentence has a record citation to. If they notice something, the appellee says, "Oh, the appellant misstated that," but there -- you know, there's no explicit instruction to tell them to note that in the report, but they may.

MR. DeROSIER: Okay. But they're just generally very careful about making sure that

everything that the judges see, from their perspective --

MS. RUECKE: Right.

MR. DeROSIER: -- is in the record. MS.

RUECKE: Yes.

MR. DeROSIER: Very good.

CHIEF JUDGE MURRAY: Well, can I just say --

MR. DeROSIER: Oh, absolutely.

CHIEF JUDGE MURRAY: -- I mean, they do a very good job at doing this.

JUDGE REDFORD: Yes.

CHIEF JUDGE MURRAY: I mean, there is -- it's not frequent, but not infrequent either I guess, where they'll point that out, whether it's a footnote or however, that this was stated but there's no record support for it and this is what really happened. They're pretty much on top of that.

MR. DeROSIER: Okay. Great. So I think what we're going to try to do now is let's see if we can work in one of our hypotheticals because, Chief Judge Murray, you mentioned the idea of filing a motion to strike in certain situations.

So the hypothetical that I want to get into relates to a situation where it's deposition testimony, it's not part of the lower court record, but it gets attached to the appeal brief, it's in the appendix or

maybe it's not in the appendix, but it's referenced in the brief. You know, should that be a situation where the appellee considers filing a motion to strike?

Let me see if I can get this up on the screen. All right. And so what we'll do before I turn to the panel is give everybody a chance -- it looks like people have already started to vote. Maybe take a minute to cast your vote on whether you think a motion to strike in this kind of situation is warranted.

All right. Well, it looks like a pretty solid majority of the people in the audience think that a motion to strike should be filed. Chief Judge Murray, what do you think about that?

CHIEF JUDGE MURRAY: I agree with the majority.

MR. DeROSIER: You agree with that answer?

CHIEF JUDGE MURRAY: Yeah. It brings it to the court's attention, and it can -- if it's one attachment or an exhibit, whatever, it can get removed before it even goes to trial.

MR. DeROSIER: Okay. Judge Redford, what do you think?

JUDGE REDFORD: I agree. MR.

DeROSIER: And --

CHIEF JUSTICE McCORMACK: Same.

MR. DeROSIER: All right. Very good. Thank you. And I will say that -- now, I don't know how often topics like this come up in discussions with your colleagues, but I will say I've had five motions to strike. I've had them granted, I've had them denied, and it was left to my appellee brief to address, you know, some things of this nature.

Would that be surprising that maybe some of your colleagues maybe are more inclined to just say just work it out in your response brief and, you know, we'll figure it out. We only rely on the record --

JUDGE REDFORD: We didn't say we were going to grant the motion.

MR. DeROSIER: That's fair.

CHIEF JUDGE MURRAY: Well, it depends --

MR. DeROSIER: Sure.

CHIEF JUDGE MURRAY: -- on the context. I mean, if it's a couple pages, it might not be worth going through the whole thing of doing it, you know, but if it's something more egregious and we can really excise it from the case, then that's more likely going to get a grant.

MR. DeROSIER: Okay. So use your judgment about how bad the offense is.

CHIEF JUDGE MURRAY: You know, if it's two pages of the deposition that weren't attached, then just bring it up in oral argument --

MR. DeROSIER: Sure.

CHIEF JUDGE MURRAY: -- and it can be taken care of.

MR. DeROSIER: Okay. That makes sense. All right. The -- this is kind of -- I'm going to try to keep track of my time. Actually, Mary, how strict do you want to keep to our schedule?

MS. MASSARON: Well, we could go over like by five minutes, but we don't want to go over much more.

MR. DeROSIER: Okay. Yeah, because I want to try to keep us to our schedule. We have a lot more that we could talk about, and like I said, I wanted to leave some time for questions as well. So, actually, Mary, do you mind maybe just checking to see if we had any questions?

MS. MASSARON: If you have questions, hold them up.

MR. DeROSIER: Maybe raise your hand if you have a question. Now, so while Mary's doing that, let me ask about doing a counterstatement of facts. I know one thing that I sometimes struggle with is if I'm the

appellee, I don't want to just pretend that the statement of facts that the appellant did doesn't exist.

But what's the right balance of sort of presenting your own story and then trying to balance that with addressing what you consider to be -- and whether it's misstatements or you just want to present something that the appellant says, give it a different spin, do you have any tips on appellees doing an effective counterstatement of facts? And maybe we can start with Chief Justice McCormack on this because I've kind of left her alone the last couple --

CHIEF JUSTICE McCORMACK: Thank you for leaving me alone. You know, again, I think it's more of an art than a science, but a really great appellate brief writer knows how to agree with all that you can agree with in the other side's brief and then point out where you think it missed important emphasis, right?

So you start out as, you know, "I largely agree with what my brother counsel explained to be the relevant facts, but there's this other thing that bears emphasis." You want when the judge starts reading your argument for you to have pivoted the facts to those that matter most to your argument. You know, it's kind of an art, but I think there's a way to do it.

MR. DeROSIER: Okay. Chief Judge Murray, what do you think about that?

CHIEF JUDGE MURRAY: I mean, I think it's hard probably to do it -- it's been so long since I've done one -- but an appellee statement of facts. I almost think that like Chief Justice McCormack was saying, it's more of an art because, you know, you don't want to just regurgitate what he said. We're not going to ignore that there was a statement of facts in the appellant's brief.

And so to me, it's like I would focus on the appellant's statement of facts. Do they have enough record cites? Because if they don't, then we're going to look at yours because you will.

Did the appellant's statement of facts quote the real relevant dispositive testimony? If they didn't, and maybe they don't have it, then the appellee's brief is a perfect time to do that, to convince us that, you know what, they said this is what transpired, but here's the actual testimony and it didn't transpire the way they said. Without being argumentative, but just laying it out as you go along without, like everyone said, a complete regurgitation of just everything that transpired in the case.

MR. DeROSIER: Okay. So helpful to sort of just sharpen the facts. If they're fairly stated, you know, don't worry about repeating them.

CHIEF JUDGE MURRAY: Right.

MR. DeROSIER: Just really try to focus on what the differences are.

CHIEF JUDGE MURRAY: What's the point? If it's a summary disposition and things are undisputed, then why -- there's no harm in saying we agree, they've had the right record cites, we agree with the facts cited by the appellant. They still lose for these reasons. You know, I mean --

MR. DeROSIER: Judge Redford, it looks like you're nodding in agreement?

JUDGE REDFORD: I agree with both the chiefs, and I think it's very -- I think it actually is very persuasive when you see "I agree with the statement of the facts by my opponent," you know, and then you move into your legal argument, if it's strictly a legal question. But I agree with both of their assessments.

MR. DeROSIER: Okay. Well, thank you. So we'll get to questions from the audience in a minute, but what I thought we would maybe try to do, I had mentioned that we had two hypotheticals. We did the one just because, I don't know, I hope you guys find it kind of fun. Why don't we try to do the second hypothetical, and then maybe we can consider turning to questions from the audience.

And this hypothetical relates to -- and I don't know how often it comes up for people, but whether

it's an amicus brief or whether it's a party's brief that cites something that's outside the record, but it's something that arguably the court can take judicial notice of it.

And so I think that when scholars talk about judicial notice, they distinguish between facts, of course, that are case specific, facts that are more general either relating to society in general or a scientific principle, maybe it's a study, and so that's actually where our next hypothetical comes in.

And so it asks, in an appeal involving an expert challenge, there's an amicus brief, but it could be -- you know, it could be a party's brief as well, cites a scientific study, but it's -- so it's not case specific, but it is important because it undermines an expert's opinion in the case and yet it wasn't part of the record.

So the question is whether that would be a situation where taking judicial notice, whether that would be proper or not. And it looks like people have had a chance to vote. I think again the -- pretty good strong majority in favor of that wouldn't be an appropriate situation to use judicial notice. Chief Judge Murray, what do you think about that?

CHIEF JUDGE MURRAY: Well, I always like going with the majority. Actually, not always. But no, I

think for sure because I think in this context, I mean, I think the scientific study is what they would have used when they were in the trial court when they were challenging. And so even though it may be something that you potentially could take judicial notice of, I don't know why you would because it seems to me that in this context they just -- you know, one of the parties failed to do it and the amicus came up with it.

MR. DeROSIER: So it's sort of prejudicial

CHIEF JUDGE MURRAY: Yeah. I mean, they didn't do their homework, the way the amicus thought they should at least, in the trial court.

MR. DeROSIER: When would you, in your experience, think of maybe a common situation where judicial notice is okay or where you've done it personally or you've been on a panel that --

CHIEF JUDGE MURRAY: You know, the only things I can think of were, you know, like maybe official weather reports --

MR. DeROSIER: Okay.

CHIEF JUDGE MURRAY: -- we have a slip and fall case. You know, I don't know if it's even judicial notice if you recognize like if you're dealing with a statutory issue and there's been subsequent things going on in the legislature, you know, bills that maybe not

have been enacted yet, but bills that exist. I think that would be something you could certainly at least take notice of. But, you know, frankly, I don't recall coming up with a lot where the Court of Appeals ascertained judicial notice of things.

MR. DeROSIER: Judge Redford, what's your experience? Anything you want to add?

JUDGE REDFORD: No, I agree. It's very unusual that you would take judicial notice at certainly the appellate level, but even at the trial level. You know, maybe populations that's part of census data, but it's -- you know, the word "take judicial notice of a study," I -- immediately that doesn't sound logical to me, so unusual.

MR. DeROSIER: Chief Justice McCormack?

CHIEF JUSTICE McCORMACK: I actually think it's an incredibly interesting topic because it implicates the very role of the branch because, obviously, if the trial court didn't have a chance to consider that study, even if it's the most -- everybody would agree it's the most important study on the topic, and your question as an appellate court is reviewing whether the trial court's decision was an abuse of discretion, it's kind of unfair to say, "Yeah, it was because the trial court didn't have the most important information before it," right? I

mean, it sort of implicates like the very role of the branch.

There are federal circuits that have specific rules for considering facts that are not properly before the record, and nobody -- it's sort of judicial notice, but we don't always call it that, right?

So the kinds of facts that both Chief Judge Murray and Judge Redford were talking about trial courts noticing are what are usually known as legislative facts, and some of those are, I think, easy for courts, things that are in government records, things that are in other court records, pleas, you know, judicial judgments in other court proceedings. Courts have no problem taking notice of that. Appellate courts too. We don't call it judicial notice but we're doing it, right?

But now it's gotten really interesting because with, you know, the internet at our fingertips, it's really easy for us to go out and do our own research on what really is the evidence about this scientific question, and it's complicated. So there are federal circuits, as I said, who think because they have an equitable role, they have processes for considering evidence that's not -- that wasn't before the trial court. The 11th Circuit does it, the 2nd Circuit does it, and it's, frankly, really interesting to me like why they would do it.

The problem with it, of course, as you know, is there's a reason why we want the trial courts to take the first shot at this information because they can kick the tires of it and figure out, you know, how good it is or how bad it is, you know, for the proponent of it, and we like to have the advantage of that trial court process before we put any confidence in it.

So I think courts should be really -- I personally think courts should be really, really wary of it for all of these appellate role kinds of considerations, but there are federal appellate judges who disagree with me, and strongly so. And so I think it's a really, really fascinating topic and I could talk about it for a lot longer, but I think I've already been talking too much, so --

MR. DeROSIER: So it sounds like it can be certainly tempting, but you just want to be very careful.

CHIEF JUSTICE McCORMACK: Yeah. I mean, so I think everybody knows the story of the 2002 SCOTUS case McKune, which is Justice Kennedy's plurality opinion where he cites this 1986 article in Psychology Today for the proposition that sex offenders are 80 percent likely to recidivate, and it turns out, you know, it wasn't true in 2002. It wasn't even true in 1986.

You know, the data actually shows there's about 20 percent who are high risk and likely -- but it's in this plurality SCOTUS opinion, and then, of course, it gets repeated in courts throughout the land because Justice Kennedy found it from a 1986 article. It's crazy town, right?

CHIEF JUDGE MURRAY: And that's what I was thinking too is all the reasons Chief Justice McCormack said it's a dangerous proposition, but if the courts can just all of the sudden start picking stuff off of the internet and, one, you're picking it off maybe for another side, and that's not fair because you're not giving the other side an opportunity to address it. And that's not our role.

You know, bring us all you want to tell us and then we'll make a decision, but I'm not going to go searching for anything else that I think might be helpful unless it's a case, a statute, or that. And even statute maybe not if it wasn't brought up.

JUDGE REDFORD: Right.

CHIEF JUDGE MURRAY: So it could be a dangerous situation.

MS. RUECKE: So, Phil, just one thing. MR.

DeROSIER: Yes. Thanks, Julie.

MS. RUECKE: If the amicus has the study that really does undermine, would their best position be

remand it to the trial court and let the trial court see how much that undermines their ruling? Would that be persuasive to a panel?

JUDGE REDFORD: It's certainly something to consider.

CHIEF JUSTICE McCORMACK: I mean, if you're allowed to do that, I think you should because if you really think there's some like piece of information that the trial court should have considered and you're allowed to like let them -- go for it. I can imagine the party who thinks the other party should have brought that to the attention of the trial court could be like, "What? Wait a minute. How many tries do you get?"

Another way to do it is just to in the opinion mention that the amicus briefs reference this really important study that might have made a difference in the trial court's decision. But the trial court didn't have it, and our job is to review what the trial court did. Next case we'll see it, right?

So, you know, the system is built to be able to fix this problem in the next case, and sometimes we have to resist the urge to want to fix it right now. But I think that doesn't mean, you know, repeating something that was said in a plurality opinion in 2002 that was based on no scientific evidence at all.

Having said that, the Illinois Supreme Court cited that statement last year, so it's -- there are some complicated problems.

MR. DeROSIER: Absolutely. All right. Why don't we turn to Mary, who I see has some questions.

MS. MASSARON: I have a whole set of questions here, and one is sort of following up on what you were just talking about I think, which had to do with the underlying theory about what the record is and why it's important and why it should be limited.

So I wonder if you could talk about that theoretical aspect, and maybe, Chief Justice McCormack, since you mentioned that at the outset, you could elaborate a little bit on your view of that.

CHIEF JUSTICE McCORMACK: Well, I actually think that's what's interesting about this whole topic because it's undertheorized, right? I mean, it's fundamental on the one hand. We all sort of, you know, like know in our gut that the basic rules of the road are appellate courts decide cases based on the claims that have been brought to them by the parties and based on the factual record that was presented to the court below when it made whatever decision it was that the parties are asking us to review.

That's the fundamental principle that kind of drives everything we do. It's not spelled out anywhere,

nor are the exceptions to it -- and there are many -- and neither part of that is well theorized. I believe that the reason why appellate courts consider the claims brought to us by the parties and the factual record below is because -- like it's for a bunch of reasons.

One is judicial economy. It does not make sense for us to become -- we have a trial court because it's best situated to, as I said, kick the tires of those claims and sift through them and make determinations from which we can make our judgments. And one is so that we don't make mistakes because we don't have the ability to have those processes.

And the third is for public confidence in the rule of law. Because if you can present your best case in the trial court and then the appellate court is going to go find a study that it likes to come to a different conclusion, then, you know, what are the rules anymore? And so I think for those sort of three institutionalist reasons, that's why appellate courts should be really careful when they make these discussions.

MS. MASSARON: Well -- go ahead.

JUDGE REDFORD: Yeah, I agree with everything the chief justice says, but I think it goes to the very heart of our adversarial system of justice. We are not an inquisitorial like many common law countries -- or like

many countries in other parts of the world. We're adversaries.

The judiciary is the neutral and detached decider of what is brought to it, and it cuts to the finality of judgments, it cuts to the predictability of the law, predictability of the law of the case, and the underlying confidence in the system.

If every disappointed participant in the justice system believes that there is an indefinite shelf life to the number of times they can bring additional information, it really, really compromises the value of the system, it compromises our confidence in the rule of law. I think it's so important that we stay within our lanes of what our important, but limited, role is as far as the adjudication of the facts and the law that are before us.

MR. DeROSIER: Anybody else want to add anything before maybe we can try to --

CHIEF JUDGE MURRAY: They said it perfectly.

MR. DeROSIER: Again, keeping track of the time. Maybe we can try to get one more question, unless anybody has anything else on the last one?

MS. MASSARON: I have a whole stack, but let me follow up on something that you were talking about which is related to one of the questions here, and that has to do with what Thomas Marvell's book, Information Gathering

in the Adversary System, talks about in terms of categories of facts.

One is the case facts, and I think we've been mostly talking about the case facts, and the poll went to the case facts and sort of presented this uniform sense, I think, that you should be limited to the case facts that were presented in the trial court, the appellate courts oughtn't be going reaching out, adding to that universe of facts.

But when it involves social facts or legislative facts that are sort of germane, not to the specific factual dispute, but maybe to the policy considerations of an appellate rule of law or its practical implications for society, does that make a difference? That's the question.

CHIEF JUDGE MURRAY: I would say yes, you know. I mean, it's -- especially if it's in an amicus or whatever, having the additional background to an issue that wasn't provided by the parties or one of the parties didn't provide that wasn't provided to the trial court, I think it's fine.

Like you said, you're not adding evidence. You're not necessarily making an additional argument that wasn't made by one of the parties or wasn't made below, but you're just giving it better context with stuff that we are able to consider without worrying

about if it was presented to the trial court. I mean, usually it's very helpful to do that. At least I think.

MS. MASSARON: Anyone else want to weigh in before I go to another question? Okay. We have a lot of technical questions here. One question has to do with whether a ripe area for remand might be settling the record when there is a record that has many, many bench conferences or colloquies that are not in the transcript but end up being vitally important to the outcome of the appeal.

How would you view a motion to remand in that circumstance? I mean, is that something you would say, "Oh, yeah, we should do that," or is that something you would say, "The lawyer should have made sure to make the record and too bad for you"?

JUDGE REDFORD: Mary, if the question is if we get a motion to remand so that we can memorialize the things that are not a matter of record, I'm not sure it makes sense to remand for that. You know, if you have the side bar conference, memorialize it the next time the jury goes out and get both -- and if your trial court hasn't given you the opportunity to, respectfully ask the opportunity to amplify the record, you know?

I think, you know, most of us who've been

trial lawyers have had the necessity of, "Judge, I know you're super busy, but could we address this one thing?" You know, however you want to do it. I don't know the remand's going to fix it.

CHIEF JUDGE MURRAY: But, of course, with everything there's, you know, exceptions and all that. I can remember a case that we had somewhat recently where I believe it was a custody case, and at the end of the one day, the parties said, "Okay, we'll show up on this day and, Judge, I have this witness left and this witness left."

They show up on that date and the judge just goes right into the decision, and we're all like what in the world happened? And there was nothing at all. The lawyers who were on appeal didn't handle it in the trial court. No one knew what happened, but all of the sudden they didn't worry about the rest of the witnesses. And I don't, frankly, remember if we remanded it or not, but it was perplexing. And maybe we should have if we didn't.

MS. MASSARON: I have two more -- I don't know where we're doing on time, but --

MR. DeROSIER: Well, I'll tell you, it's just about 10:30, so however close we want to keep to the original schedule. I'll leave it up to you.

MS. MASSARON: All right. So I'm going to ask at least two more. There's a whole stack, and I

apologize to those of you whose questions we're not getting to.

One is -- and I think this is an overarching question that really informs, or should inform, the extent to which a motion for remand would be allowed, the extent to which any -- or a new trial granted or not. It has to do with the balance between judicial efficiency and getting to the correct result, and that's not an easy question in the abstract. We can all say we want to balance it.

But I wonder if you have some, as concretely as you could, thoughts about how you think about that when you're looking at motions or when you're looking at appeals of a jury trial outcome that may have had problems with it.

CHIEF JUSTICE McCORMACK: I mean, we don't get the motions to remand as much as you all do. Sometimes in criminal cases if a party has asked the Court of Appeals to remand for an evidentiary hearing and the Court of Appeals has declined, we will entertain those, but it doesn't come up that often.

But I think, Mary, that that question kind of goes to -- that's like the question for all time, finality versus accuracy, and what -- you know, the rules of appellate procedure are supposed to strike some balance as between those two important goals, right? And where our -- our particular place in the larger justice system is in achieving that balance is something, you know, Roscoe Pound was writing about a long time ago. So there are lots of books on this topic --

MS. MASSARON: Indeed.

CHIEF JUSTICE McCORMACK: -- and I think we should talk about it for the next two days.

MS. MASSARON: Excellent. I have one easy question. It's not easy when you're trying to figure -- a narrow question, and that is that we're talking about the filing of exhibits. The question is, when you're filing exhibits electronically, colored photos, color maps, do they appear in color when you read them, and if they don't, how can we ensure that you have that color which is very helpful in reading the maps or charts that are part of the record?

CHIEF JUDGE MURRAY: Well, they're in color on our screen, and we have color printers -- not necessarily in our offices, but in our suites -- so that we can print them off to see that, so it's no problem.

MS. MASSARON: That's excellent. Were you going to add --

JUDGE REDFORD: No, he struck it perfectly. I was going to say, when he said he had a colorprinter --

CHIEF JUDGE MURRAY: Not in my office. Not in my office.

JUDGE REDFORD: You have your own restroom.

CHIEF JUDGE MURRAY: I've got a lot of other things there that you're going to laugh about, but not that.

JUDGE REDFORD: I'm just a mouth-breathing trial court judge.

MS. MASSARON: We have a lot more, but --

MR. DeROSIER: Sure. Well, let me wrap it up. So let's take a break, but first, of course, I want to thank again my distinguished panel for coming today. And also, just so you appreciate it, they don't just show up and come up and answer questions. They help me prepare, we had a conference call, you know, they help me vet the material, so they put a lot of work into being panelists, and so I really appreciate deeply the help that you all gave me in doing this today, so thank you.

(At 10:32 a.m., plenary session concluded)

II. Breakout Sessions: Just the Facts

A. Drafting the Statement of Facts as Appellant

- While there may be exceptions, it was generally agreed that a carefully-crafted statement of facts presented on a narrative basis in chronological order is preferable.
 - Of course, the application of this approach will look different in different cases. For instance, one practitioner who handled child protection cases stated that she provide additional background facts to provide context for the dispute and assist the reader in understanding the case. Another said that for cases challenging the decision to waive a juvenile to adult court, she presents the facts in the same order as the factors governing the legal standard.
- There was a consensus that the writer should give as much information as necessary without leaving out any important facts, including those detrimental to your legal position. The writer should ask of every sentence: is this fact necessary to decide the legal issue?
 - A good suggestion was to draft the legal argument first and use the facts from that analysis to draft the statement of facts.
 - Another suggestion was to compare the completed statement of facts to the argument to ensure no facts were missed.
- Don't omit important facts that are adverse to your position. Several court staff stated that brief writers should rest assured that staff attorneys or judicial clerks will identify all relevant facts during their review of the record; it is better to read it first in the briefs than learn it elsewhere and wonder whether the writer is hiding other important information.
- Where you have bad facts, address them but try to emphasize the good facts and then contextualize the bad facts. Ultimately to be a good advocate you need to include all the facts—good or bad.
- This does not mean leaving advocacy behind, however. As the appellant, you should shape the story and paint the other side into a corner as to how the story is told. The good advocate writes a fact section that has the court wanting to rule in one's favor after being read.
- Several court staff cautioned not to put too much advocacy in the statement of facts. Inaccuracy and snarkiness in the statement of facts will turn the reader off. The goal, as one court staff put it, is “soft persuasion,” drafting a neutral statement of facts that advocates inconspicuously.

- One suggestion was that the goal should be for the court to copy and paste your statement of facts into an opinion that decides the case in your favor.
- Attorneys, court staff, and judges all agreed that it never is a good idea to attack the opposing party.
- The judges who attended generally preferred the use of a party or witness's name, unless there are a lot of names involved, in which case designations like plaintiff and defendant can be helpful; appellant/appellee is never helpful.

B. Drafting a Counter-Statement of Facts as Appellee

- There was considerable discussion about appellees and whether to draft a counter-statement of facts, or rely on the appellant's statement.
 - Several appellate prosecutors stated that they will rely on the appellant's statement if it fairly captures the relevant facts, and instead identify the factual statements with which they disagree and add those they think are relevant that the opponent left out.
 - The consensus among civil practitioners was to write "the" statement of facts as appellee and not merely respond to the appellant's statement of facts.
 - Several judges agreed that it is important for advocates to tell their own story, and that merely adopting the appellant's facts may be a missed opportunity to do that.
 - Several court staff strongly recommended appellees drafts their own statement of facts in close cases or those in which the court has granted leave to appeal. They stated that, regardless of which party you are, your objective should be to write a brief that is the go-to resource for the reader when deciding your case. A comprehensive, persuasive statement of facts is an important component of that resource.
 - If the appellant's statement of facts is complete and accurate, the appellee's may be shorter. But, as one lawyer observed, "I always want to tell my story in my own words."
 - Providing a complete counter-statement of facts as appellee also increases the chance that the court will use or more often rely on your brief when preparing the opinion. The order in which the judges read the briefs and prehearing reports varies.
- One suggestion that was widely favored was for the appellee to borrow the lower court's recitation of the facts. Not only are you defending the lower court decision, but it shows you are limiting your discussion to the trial court record.

- It was also generally agreed that it is good practice to point out errors, misrepresentations, or improper advocacy within the appellant’s statement of facts. One suggestion was to do this in footnotes, so as not to interfere with the story you’re telling.

C. Use of Visuals in Briefs

- Use of visual aids is often helpful, though attorneys must be careful not to improperly supplement the record, e.g., a Google Maps photograph.
- A criminal practitioner suggested that photos can often convey more information more effectively than mere words (especially about the layout of a location), but said that he struggled with using images—such as streetview images—that weren’t part of the lower court record. A member of the bench responded that if an image isn’t part of the record, the court won’t consider it.
- The consensus among both criminal and civil practitioners was that it’s fine to do so whenever it’s relevant and can make a point—i.e., incorporating visual images in briefs is the “new normal.”

D. Use of Transcripts

- There was considerable discussion about whether to attach the full transcript or simply the cited pages to the briefs. The concern is that attaching only the cited pages may omit some necessary context. Most of the judges agreed that the surrounding pages are useful to understand the context of testimony and, if available, they would read them, though there’s case law suggesting a more narrow review (*Barnard Mfg Co v Gates Performance Eng’g, Inc*).
- The concern with filing a large number of pages is decreasing with electronic filing. The judges expressed a preference for including the entire transcript and highlighting the relevant portions.
- The group also discussed the tension between building the record and not overwhelming the trial court. Certain trial judges, for example, do not want to see full deposition transcripts; they want only relevant excerpts.
 - Many practitioners provide only the relevant pages to a deposition transcript in the trial court, and general discussion supported the notion that this is what trial courts would generally prefer.
 - But most practitioners thought that doing this could preclude an advocate from citing more broadly from the deposition transcript on appeal.
 - The consensus was that best practice now is probably to attach the complete deposition transcript in the trial court (perhaps in mini form)

with the cited testimony highlighted. Everyone agreed that this preserved flexibility to cite from the transcript on appeal, while most practitioners hoped that this would be helpful and acceptable enough to the trial courts, particularly now that motions are submitted electronically.

- It was noted that this concern is limited to deposition transcripts, since trial and hearing transcripts are filed with the courts in their entirety.

E. Review of video of witness testimony in lieu of transcripts

- An interesting discussion related to the effect of an appellate court's ability to review video evidence, and in particular, whether it affected the standard of review relating to credibility matters.
 - As a general principle, appellate courts must defer to judgments about credibility made by a jury or trial court. The discussion focused on how the opportunity to view video evidence should be used when the standard of review is de novo.
 - The participants had different views about how video evidence can affect review under the clearly erroneous or abuse of discretion standards. An appellate court can view the witnesses and make the same judgments as a jury or trial judge about what happened. Most participants agreed that credibility could not be reconsidered by an appellate court even if the standard of review was de novo. Some thought an appellate court could rely on a video to determine specific facts, such as whether a criminal defendant was handcuffed in court.
- One attorney suggested that physical appearance is relevant—and, in fact, the jury instructions refer to the evaluation of witnesses' physical appearance. Others responded that appellate review of trial videos is problematic because jurors may have twelve different reasons for disbelieving a witness. Having an appellate judge assess credibility undermines the jury's role.
- Another attorney felt strongly that if an appellate court reviews videos of testimony, that review necessarily becomes de novo, and that having appellate courts review videos would mark a fundamental change in the role of appellate courts.

F. Use of Facts at Oral Argument

1. Reciting facts

- When it comes to reciting the facts, several court staff reiterated the well-worn spiel that judges give before every case call: it is unnecessary to recite the facts of the case. Highlight only those facts that are important and outcome-determinative.

- If asked about a fact in the record for which you do not have a ready answer, you should say so and offer to follow up with the answer. Some practitioners stated that, when the factual issue seemed central to the court’s decision, they have filed a post-argument letter.

2. Handling factual misstatements by the opposing party

- If your opponent misstates a fact, you should point it out, but do so respectfully. Advocates should rest assured that judges have the benefit of support staff who review the entire record and will know whether a factual statement is supported by the record.
- When the misstatement is made in rebuttal, an attorney may request the opportunity to briefly correct it or submit a supplemental brief.

G. Information Outside the Record

1. Handling questions during oral argument about information outside the record

- One person suggested pushing back respectfully, as difficult as it may be to do. Several participants lamented how difficult it was to plan for these unpredictable situations, which led some practitioners to recall instances in which they got pre-argument orders from the court identifying issues the practitioner should be prepared to discuss. Many participants agreed that making such communication a standard practice in these situations would make oral argument more helpful.
- There was a consensus that attorneys should point out that the question relates to something outside the record. At the same time, the attorney should still attempt to answer the question. The attorney can also offer to supplement the record on the particular point. A judge indicated that 99 out of a 100 times, the court will decline this offer of supplementation.
- It was noted that a judge’s inquiry about material outside the record does not necessarily mean that the information is material. Sometimes judges just want to know the state of things where facts are still evolving. An attorney added that it is always best to admit what one does not know.
- One practitioner put it this way: Be ready to win with the record as it is, but be ready to answer if you can. There is something informal and conversational about the court of appeals that can sometimes invite extra-record questions and answers.
- Another practitioner pointed out that judges often ask extra-record questions in injunction cases. “You said this terrible stuff would happen if the injunction was denied, and it was denied. Did those terrible things happen?” A good advocate should know the answer.

2. **Judicial notice**

- It was agreed that courts generally exercise judicial notice appropriately.
- There was discussion about the difference between taking judicial notice of “case facts” and “social facts.”
- There appeared to be general agreement that court records are appropriate for judicial notice. But records maintained on OTIS, for example, may not be.
- While the Supreme Court relied on the State Bar Economics of Law Practice survey in *Smith v Khouri*, it may not be appropriate for judges to consult or rely on the Physician’s Desk Reference if the parties didn’t put it in the record.
- Relatedly, some expressed concern about judges straying outside of the record to do their own research.

3. **Amicus briefs**

- Using extra-record scientific evidence in amicus briefs was discussed. Several civil attorneys were concerned with the possibility that an amicus could hijack the case by including references to scientific studies that were not presented at the trial court.
- This led to a discussion about the materials appropriately included in amicus briefs. Most participants agreed on a distinction between materials related to policy issues and those related to facts in the case, although the line was not clear.
- Some practitioners shared their experiences where amici really do go beyond the record facts and courts seem to consider them. This can be particularly persuasive when an amicus can expand beyond the scope of a single case. “Here’s how this affects the state as a whole, or an entire system.” But staff and the judge noted that these are probably most helpful in the Supreme Court because the Court of Appeals is an error-correcting court.
- One member of the court staff said that amicus briefs that regurgitate the parties’ arguments do little other than alert the court to the broader interest in the appeal. But at times an amicus brief argues far better than the party’s brief, and those are helpful.

4. **Motions to strike**

- Participants discussed the issue of filing motions to strike transcript pages that were not part of the record.
- It was observed that the Court of Appeals will sometimes deny a motion to strike, despite another party’s attempt to expand the record. Some expressed the view

that motions to strike are essentially a coin toss; sometimes the court denies them, sometimes it grants them.

- One attorney observed that when the Court declines to strike new material without explaining why, it can harm the client's view of the judiciary.
- The rough consensus among practitioners was to move to strike where there are major attempts to expand the record. The consensus was to address more minor attempts to expand the record in a response brief.
- One judge observed that filing a motion to strike might call extra attention to the objectionable material. The judge also noted that the Court of Appeals cannot consider materials outside the record anyway. Nonetheless, it is helpful for the parties to identify the materials that have been improperly relied on. If the materials are in fact outside the record, the panel will not consider the materials.
- A judge offered that motions to strike are often amorphous, and don't always specifically point to the items to strike. The more specific and the more pointed, the more likely to be granted relief.
- Considerations about whether to raise the issue, cost, highlighting the evidence which may then be allowed anyway if the motion to strike is denied, are all considerations a litigant must weigh.

H. Settling the Record

1. General comments

- Several practitioners questioned whether Michigan should have a more robust mechanism for settling the appellate record.
- Apparently, in the Seventh Circuit, the parties must agree to what's in the record (with both sides having leeway to include documents that the other disagrees with).

2. Ordering transcripts

- Attorneys indicated that rarely will they not order all the transcripts. Still, there are instances where it makes sense to stipulate to only portions of the transcript. Assessing situations where only some of the transcripts must be ordered comes with experience.
- Budgetary considerations sometimes prevent the ordering of the entire set of transcripts. Also, there are some trial courts that simply do not prepare transcripts in a timely enough fashion.
- The consensus among the criminal practitioners was that they order everything (they also noted that they double-check the register of actions because there may

be non-hearing entries that involved hearings, e.g., adjournments). They explained that, because criminal appellate attorneys usually didn't handle the trial, they need to order everything "because you don't know what you don't know."

- The family law practitioners said the same thing—order everything—with respect to child welfare appeals. They also commented that, in many family law proceedings, the trial court case often doesn't stop while the appeal is pending. Thus, family law appellate attorneys should keep up with the trial court docket and, if necessary, move to expand the appellate record.
- The civil practitioners commented that they have never seen the rule requiring all transcripts enforced as long as the parties ordered everything relevant (especially in appeals from summary disposition rulings).
- Although the court rules require that all transcripts be ordered, including those of hearings not at issue to the appeal, the Court of Appeals staff relies on the parties to determine what's necessary. So if the parties order a limit set of transcripts, the staff will largely trust the parties' selection. But sometimes a transcript is missing that is deemed important, in which case the Court will issue a notice requesting the transcript. If this happens, it will delay the appeal, so it is important to ensure that necessary transcripts are ordered.

3. Transcript production issues

- It's not uncommon to have missing transcripts, particularly in domestic-relation and parental-termination cases. The Court of Appeals judges rely on the clerk's office to monitor transcript status in terms of ordering and production. The prehearing attorneys are the backup. They are instructed to read and summarize all lower court transcripts. But occasionally a transcript is missed. That raises problems because, for example, some clients don't have the resources to pay \$300 to move to compel the other side to order and produce the missing transcript.
- There was consensus that many transcript issues could be solved or further reduced if trial courts used a standardized, detailed register of actions. Trial court registers of actions vary in terms of format, completeness, and reliability. There wasn't agreement on which existing version would be a good model. While one Court of Appeals judge thought that Oakland County's register of actions would be a good model, several attorneys expressed frustration with Oakland's version. One attorney explained that the quality of the register of actions for Oakland varies because each Circuit Court judge controls the entries for his or her cases.

4. Trial exhibits

- Attorneys discussed their varied experiences with trial exhibits. Some talked about how trial courts will not accept exhibits. There are also various practical difficulties. For instance, in criminal cases many times exhibits are not accepted but then the appellate attorney, who did not handle the trial, has difficulty

obtaining the exhibits from the defendant's trial attorney because he or she is worried about an ineffective assistance of counsel claim. In such cases, the prosecutors are often very helpful.

- The consensus among criminal, civil, and family law attorneys was that obtaining trial exhibits is one of the most difficult and frustrating aspects of post-trial appeals, especially because they often go unfiled (and the trial attorneys don't always keep track of all of the exhibits).
- A criminal practitioner asked whether we need a new court rule requiring the trial court to keep track of (and store) the trial exhibits. There was some skepticism about whether certain counties can be trusted with responsibility. Criminal practitioners from both the prosecution and defense stated that physical evidence poses a significant problem. Because that sort of evidence can include guns, drugs, and material related to child-abuse, county courts often don't to retain those records. As a result, the criminal practitioners suggested that the rule could distinguish between documentary and physical evidence.
- Several other practitioners suggested that it would be better to have the parties keep track of the trial court record (including trial exhibits), although one practitioner commented that in most states, the court or court reporter keeps track of the record. Furthermore, although the current rule says that the parties are supposed to retain and file exhibits, several practitioners noted that courts often reject such filings.
- When it comes to large exhibits, trial counsel are encouraged to submit an 8½ by 11 copy of the exhibit. For instance, if one is using a large poster board to display things, ask that the trial counsel submit a copy of the poster board to the court.
- There was a general consensus that something needed to be done to ensure that trial court records are properly maintained and filed in lower court, but the group didn't reach a consensus about what exactly that something should be.
- One option is to submit exhibits directly to the Court of Appeals. Another suggestion was for each party, at the end of trial, to make a record of every exhibit admitted if the clerk wasn't taking them, and then reach an agreement that such exhibits could be filed as appendix on appeal.
- Physical exhibits present different problem. Both research attorneys and practitioners suggested submitting photographs of exhibits such as mechanical devices.

5. Video and audio recordings

- There was discussion about technology being a problem at the Court of Appeals; the Court can play videos but cannot hear audio.

- One attorney suggested that we need a court rule about videos played at trial. Perhaps there should be a court rule requiring reporters to transcribe videos or audio records. That can be hard for the court reporter, said another attorney, because people often talk over each other.
- It was agreed that the issue of how to handle video and audio recordings is becoming more common as they are much more frequently used, such as 911 calls, dash-cam videos, surveillance, interrogations, etc.

6. Materials produced or referenced at a hearing

- The general consensus was that if a document is referenced during a hearing but not attached to the briefs, counsel should make an oral motion during the hearing to make it part of the record. Without an oral motion, the document isn't part of the record, even if the opposing side didn't deny how it was described.
- When it comes to newly-produced affidavits, or when an unsigned affidavit was attached to the trial court motion or response, most attorneys agreed that the best practice is to file a copy of the signed affidavit immediately after the hearing. Filing the signed copy quickly avoids timing problems.
- There was also discussion about whether mentioning or reading from transcripts or documents at oral argument on a summary disposition motion is adequate to make them part of the record for appeal.
 - An example dealt with a deposition where no transcript had yet been prepared. The participants agreed there was no clear answer to this question. Several research attorneys would not treat such documents as part of the record. Several participants, including a judge, disagreed. A civil attorney maintained that an attorney is an officer of the court and, therefore, representations about the content of depositions or other documents should be accepted absent disagreement by the opposing party.
 - A suggestion for making such items part of the record was filing a motion to remand or motion to expand record. Although motions to expand record are usually denied, one may be appropriate in this instance. The participants agreed that such a motion is easier than a motion to remand.

I. Supplying Facts for the First Time in a Motion for Reconsideration

- Views differed on whether it is appropriate to introduce new facts in a motion for reconsideration. One judge suggested that the extra material would be considered in the record on appeal. Another stated that he would be reluctant to consider the extra material.
- New evidence vs new case law
 - The consensus was that it's okay to present new case law; new evidence is

tougher.

- There is strong case law against presenting new evidence in a motion for reconsideration, but sometimes you have no choice.

J. Supplementing the Record With Subsequent Developments

- Sometimes there are important developments in a case after the appeal is filed. For example, a party may take a contrary position in the lower court while an appeal is pending, or events may render an appeal moot.
- The consensus was to raise the issue as early as possible, perhaps through a motion to supplement or to remand for further factual development.

K. Motions to Remand

- Participants discussed the use of motions to expand the record or to supplement the record. Attorneys indicated that this is something they rarely do; that there must be very good reasons to file such a motion. At the same time, attorneys indicated that such a practice is allowed more in the criminal context. But even in such a case, the Court of Appeals may likely remand to the trial court for further factual findings.
- Criminal practitioners explained that expansions of the record are relatively common in claims of ineffective assistance of counsel. In particular, a *Ginther* hearing may be used to expand the record.
- A motion to remand for a *Ginther* hearing might include items not in the record as attachments. Even if the motion is denied, those items are part of the record. It is unclear what weight is given to this material, but a few practitioners reported that this sometimes works.

III. DeWitt C. Holbrook Memorial Fund Luncheon—Remarks by Paul Clement

MICHIGAN APPELLATE BENCH BAR CONFERENCE
March 28, 2019

1:09 p.m.

The Inn at St. John's Conference Center
44045 5 Mile Road Plymouth, Michigan 48170

Dewitt C. Holbrook Memorial Fund Luncheon
Speaker: Mr. Paul Clement

REPORTED BY:

Ms. Leah M. Witt, CSR-8825
Certified Shorthand Reporter
(248)644-8888

MS. MASSARON: Good afternoon. I want to welcome you to our luncheon and to hearing from our keynote speaker. And I should say as I'm introducing him, his participation is made possible by a grant given from the Dewitt C. Holbrook Memorial Trust Fund, a trust that's administered by Comerica Bank and which has been very helpful to us, not only in bringing keynote speakers of the caliber of our guest today, but also in helping us provide the large amount of scholarship money that we've been able to have in order to make sure that many of you can be with us who might otherwise not be able to afford the registration fee.

It's my privilege today to introduce you to an appellate lawyer who has been recognized repeatedly as the best U.S. Supreme Court advocate of his generation. He's a partner in the Washington, D.C., office of Kirkland & Ellis and a distinguished lecturer at Georgetown University Law Center. He brings not only years of serving as the solicitor general and in the solicitor general's office, but since then, years of experience in private practice.

He has argued more cases in the U.S. Supreme Court since 2000 than any other lawyer in or out of government, and he just argued his 95th case before the court earlier this week and more than 100 times in federal courts of appeal.

And with this impressive track record, I can tell you as someone who's had the privilege of working with Paul on some appeals, that he is as down to earth and insightful and warm as we would all expect from a fellow Midwesterner from our neighboring state of Wisconsin. Please join me in welcoming our keynote speaker, Paul Clement.

(Applause)

MR. CLEMENT: So thank you very much, Mary. The last time I was in the area, it was for the Wisconsin-Michigan game, so there's a lot more of an era of good feeling between Wisconsin and Michigan this time around, so it's very nice to be here.

I wanted to talk for a while today about the Supreme Court in transition, and I want to talk a little bit about the new members, a little bit about the last two terms of the court, and also address a few issues that the court's been wrestling with that have particular application to the state courts or the states, because I do think the court is wrestling with a

couple of interesting issues involving federalism-related issues, and it will be one of the areas where I think we will get some of the earliest insights about the newest justices on the Supreme Court.

So let me start with what is probably one of the oldest adages about the Supreme Court in Washington, D.C., which is that every time you get a new justice on the court, you have a whole new court. And that adage has been around for a long time, and I think what it reminds us is that the Supreme Court is an institution where you just have nine individuals who are meeting together in the conference alone.

They spend a lot of time together, and their personal interactions are an important part of the institution, and if you take one person out of that set of interactions and replace them with another one, it's just not that you can sort of count to five a little differently with the new justice. But the new justice really does affect the interaction among the justices and the way that they proceed.

And I think that's true in almost every case, but I think it is particularly true with respect to the most recent change in personnel in the Supreme Court. Because if you take Justice Scalia off the court and replace him with Justice Gorsuch you are taking a

justice who's been enormously influential and has an inimitable personality off the court, but you are replacing him with a justice who, at least based on early returns, is voting an awful lot like Justice Scalia would on some of the same issues, and so you're not changing the kind of outcome of the court in the same way.

And it's interesting, if you think about the last couple of changes on the Supreme Court, most of them, would be what you might call if you were watching, say, a soccer game a "like-for-like switch." You have a Justice Stevens replaced by somebody who is voting fairly similar to him. You have the Chief Justice Rehnquist replaced by somebody who ends up voting fairly similar to him on a lot of issues. And so you haven't had too many changes of late that had been very consequential in terms of the bottom line.

And up until this last year, if I looked back over the past four or five switches, I would say the single most consequential change in terms of its effect on the bottom line of cases was Justice Alito replacing Justice O'Connor. I think that change on the court did move the court demonstrably to the right on a number of issues where Justice Alito had a more conservative outlook than Justice O'Connor.

But I think there's at least the prospect that the Justice Kavanaugh for Justice Kennedy switch could be equally, if not more, consequential, especially given the various issues and how the court is so closely divided. So I do think that in terms of this particular switch, it's had more of an impact on the court than probably any of the changes in recent memory.

And I think that has an impact from the way that an advocate like myself looks at the court because we had gotten used to, as Supreme Court advocates for an awful long time, in what you might think of as the court's most closely divided cases to think that there's probably going to be about four justices that think about this issue this way and there's going to be about four justices that think about this issue in a very different way, and then there's going to be Justice Kennedy, and I'm not sure how he's going to think about this issue, and his vote is very likely to be outcome determinative.

And I think that the focus on Justice Kennedy and how he was going to vote defined a lot of what Supreme Court advocates did in lots of cases. Certainly not in every case. Plenty of areas I can point to where either the court was likely to decide it 9-0 either way or cases where Justice Kennedy had already staked out a position and he really wasn't going to be the critical

vote. But in lots of cases the focus was on Justice Kennedy.

I've sometimes been asked to describe the job of a Supreme Court advocate, and I think a pretty good working definition is somebody who tries to get five for their client. You can argue a case in which you could get from the court an opinion for three or four justices that has exactly the right analysis, accepts all of your arguments, and is really exhilarating to read, but clients have a word for those kind of cases. They call those a loss.

So the job is not to produce the most satisfying dissenting opinion you can. It really is to get five justices to support your client's position. And with that in mind, there's been so much of this focus on Justice Kennedy for years, and now the focus I think has changed in material ways.

The other thing that I think made this particular change more momentous than the average just adding a new justice to the mix is the nature of the Kavanaugh hearings and the very contentious and partisan nature of those hearings.

I am sure all of the other eight justices looked at those hearings, and they may have had different views about who was most to blame about the situation, but I have to think that all eight justices looked at

those hearings and agreed that those hearings did not reflect well on the court; they were not a positive thing for the court going forward.

And I do think for that reason, you know, one of the things that I think the court and justices have consciously tried to do since the Kavanaugh hearings and since Justice Kavanaugh has joined the court is to try to keep in mind the importance of stewarding the institution in a way that it doesn't appear bitterly divided, that it doesn't appear partisan in any material way, and I think that's particularly an important priority for the chief justice of the United States.

One obvious question, of course, with Justice Kavanaugh replacing Justice Kennedy is so who's the new swing justice, which was the term that was often used for Justice O'Connor, and then in more recent years, often used for Justice Kennedy. And I think in a very real way, there may not be a swing justice on this court.

Some people have, especially based on a few particular cases, identified Chief Justice Roberts as the new swing justice. And I think that's not quite accurate. The chief, because he is the chief justice, really does feel an institutional responsibility to guide the institution and avoid some of these very controversial issues, but I don't think that makes him a swing justice so much as he may be the justice that is

the governor switch or the regulator for the court in determining how quickly they move in certain areas.

At the end of the day, Chief Justice Roberts is and remains a judicial conservative. I think in trying to understand how he approaches issues, that is the right way to think about the chief justice and his jurisprudence, but I also think he is an institutionalist and is very concerned about the court's reputation.

And so particularly in areas where moving in a particular direction would require the court to overturn some of its precedents, I think he's going to be the justice on the court that is most reluctant to kind of make those changes. So I think, in those cases, as the chief justice goes, so may go the court.

We have this sort of shorthand institution as Supreme Court watchers to refer to courts by the name of the chief justice, so the Rehnquist Court, the Warren Court, the Burger Court, and I think in many respects we will really now have the Roberts Court going forward and not really the Kennedy Court, as some people have sometimes perceived in recent years because of Justice Kennedy's critical role.

Now, if you want to think about the question of what's the Supreme Court is going to look like with the new personnel, you know, the first place to look for how the court may look in the future is to look at last term.

That may seem at first blush a little bit paradoxical, but last term was a very unusual term in the court, particularly with respect to Justice Kennedy.

Historically, Justice Kennedy, over about the last decade he was on the court, would join with what you'd loosely refer to as the more liberal justices in 5-4 opinions about 25 percent of the time. So if you look at the whole universe of the court's 5-4 opinions and you ask, you know, of the universe of 5-4 opinions, how many of those cases are essentially the four liberal justices and Justice Kennedy, historically term after term it's about 25 percent on average.

In October term 2016, just a couple of years ago, the number was actually 50 percent. Thus, in half of the 5-4 cases, despite the public perception of a conservative court, it was Justice Kennedy siding with the more liberal justices.

The number in Justice Kennedy's last term on the Supreme Court, which is to say last year, by contrast, was exactly zero. There wasn't a single 5-4 case where Justice Kennedy sided with the four liberal justices to make up a five justice block. That's not to say he never sided with the liberal justices -- there were plenty of unanimous opinions -- but in the most closely decided cases, not one of them was Justice

Kennedy joining with the justices on the left. Justice Thomas joined with the justices on the left in an important case; Chief Justice Roberts did the same; Justice Gorsuch did the same; but in not a single case did Justice Kennedy join with the liberal justices.

So if you liked last term in the Supreme Court, you will probably like the Roberts Court going forward, and if you didn't like last term, then you may not like the court going forward as much because I do think last term may be a pretty good predictor of what the court will look like when Justice Kennedy does not have the decisive vote in every case.

And so what you saw last term is a number of relatively high profile cases where the more conservative position ended up prevailing. Just to pick a couple of examples, you have a case that I was personally involved in involving the arbitration of employment disputes, and the Supreme Court decided five to four that there was not an exception to the general preference for honoring arbitration agreements for employment disputes involving collective action on behalf of employees.

There was an argument that such employment disputes were outside the general rule that you can arbitrate disputes because of the National Labor Relations Act, and that position was rejected by Justice

Kennedy and the four more conservative justices who essentially held that the Federal Arbitration Act applies in the employment context equally as in other contexts, and so those disputes were all subject to arbitration.

Another case that had an indirect local connection was the Janus case where the Supreme Court by a 5-4 vote overruled the Abood case, which was, a Michigan case arising out of the public unions in Detroit. In the Janus case, what the Supreme Court decided is that there is a First Amendment right on behalf of workers in a public union not just to opt out of a portion of their union dues that is used for First Amendment activity, but essentially an opportunity to not pay any of the dues at all, and in doing so, the Supreme Court had to overrule the Abood case.

And that's obviously a decision of tremendous import to unions and to workers, but I think it also shows that the court last term, and I think going forward, is a court that is very receptive to First Amendment arguments. Indeed, a number of the justices think of themselves as very pro-First Amendment justices.

And for some of us studying this area of the law understood that Abood itself was protective of First Amendment values since it did say that union members didn't have to pay for First Amendment activity that they disagreed with, but the Supreme Court has shown that it

is far more sort of hawkish on the First Amendment than the court back in the day that decided Abood, which was viewed at the time as being a victory for the First Amendment.

So the last case I'll mention was one of the higher profile cases of last year, but also says something about the dynamic that's going on between the Supreme Court and some of the lower courts was the court by a 5-4 decision upholding President Trump's so-called travel ban.

That was a case where, by the time it got to the Supreme Court, a lot of the focus was on whether or not the travel ban was consistent with certain statutory provisions and also whether or not there was a First Amendment religion clause problem with the way that the president rolled out the travel ban.

That is an issue that was tremendously contentious in the lower courts. Both the Ninth Circuit and the Fourth Circuit on multiple occasions ruled that the various versions of the travel ban were unconstitutional. There were a number of iterations of the government policy, and by the time the Supreme Court reviewed the case, it was essentially on something like Travel Ban 3.0, and some of the difficulties of the original policy were cleaned up, if you will, in some of the subsequent iterations.

And so in some respects it may not be that surprising that the court ultimately upheld the policy by a 5-4 decision, but I think the travel ban was not just important for its ultimate result, but for its procedural history, which involved the Supreme Court intervening multiple times and essentially telling the lower courts they had gone too far in enjoining the policy nationwide and the like. And so the travel ban case is important not just for the particular decision, but for what it shows about how the Supreme Court is interacting with the lower courts.

Now, I don't want to be understood as saying that last term was full of nothing but conservative victories because that wasn't the case, but I think it gives you a good illustration of what you need to get a result that doesn't fit the pattern.

For example, there was a high profile case in the immigration context about whether somebody could be deported for committing a crime of violence and, in that case, Justice Gorsuch provided the fifth vote for the immigrant not to be deported on the theory that the statutory definition of crime of violence was unconstitutionally vague.

You also had another case with something of a local connection, the Carpenter against United States

case involving the Fourth Amendment. This case involved somebody who had robbed a number of Radio Shack and T-Mobile stores in the greater Detroit area. The U.S. attorney's office was pursuing that case against him, and they decided that they wanted to use sort of his own technology against him, if you will, so they were able to get cell data that showed all of the places where he traveled. The police did not get, you know -- not like the content of the telephone conversations themselves, but they basically you could figure out where he was based on data that showed -- on his phone based on where he was vis-à-vis certain cell towers.

So this was an interesting Fourth Amendment case about whether or not there was even a search in that context that would require the government to sort of go to a neutral magistrate and get authorization to do this, and I was a little bit surprised in the end that this case was as close as it was. Now, this case provides another example of how it's certainly possible for a criminal defendant to prevail in the Roberts Court a case like this. In this case, the chief justice joined with the more liberal justices to say there was a Fourth Amendment violation.

I'm a little bit surprised the case was that close because in some of these other Fourth Amendment

cases that have arisen in the technology space the Court was unanimous in ruling against the government. For example, in a case about whether there's a Fourth Amendment violation if the police, when they're arresting you, do an inventory search and as part of that look at all of your contacts in the cell phone, the court said nine to nothing there was a Fourth Amendment problem with that.

Similarly, the Court had a case where the police had put a GPS tracker on somebody's car, and the court said nine to zero there was a Fourth Amendment problem with that. In *Carpenter*, by contrast, the decision ended up being five to four, and I was a little surprised just because the authorities in this particular case did not proceed with a great deal of circumspection or caution.

One of the rules I've learned about Supreme Court practice over the years is that pigs get fed and hogs get slaughtered, which is just a way of saying that, if your cases are within the mainstream of facts, you probably have a reasonable chance to persuade the court, but if not, you are unlikely to prevail.

And in this particular case, the authorities didn't just try to get cell phone data for a few critical days, but they tried to get data for a full 127

days, so basically everywhere that Mr. Carpenter was for four months was something that the police had access to, and they had over 100 data points every day. And so the argument that it's not a search to basically track somebody everywhere they are 100 times a day for a four-month period is a pretty tough argument, and I'm a little surprised that Mr. Carpenter only got four votes in that case.

So that gives you a flavor for last term and some of the issues that the court was wrestling with, but also how the court proceeded in a term in which Justice Kennedy was already not necessarily voting in the way that we were used to him voting.

Now let's take a look at the current term. My most important observation about this term is a direct result of the phenomenon I was talking about at the beginning—namely, the court itself recognizing that the Kavanaugh hearings were a bruising episode for the court as a whole.

The Justices have a couple of contentious issues, including the partisan gerrymandering case argued earlier this week that I'll talk about in a minute. They also have a case that they've added to the docket about the census and whether you can have a citizenship question on the census.

So it's not like there aren't some pretty high profile issues on the court's term, but by the standards of recent terms, there are fewer high profile cases. And I don't think it's an accident that the high profile cases that the court has put on its docket this term are cases where the court really didn't have too much of a choice.

The partisan gerrymandering case, for example, has come to the Supreme Court on the court's appellate docket. Thus, unlike 99 percent of the cases the court reviews via certiorari and the court has complete discretion whether to take a case or not, the gerrymandering cases are cases that get there on a direct appeal, and so the court doesn't have that much discretion to avoid them. So it's not so much that the justices were dying to get back into the partisan gerrymandering issue after essentially ducking the issue on standing grounds last term. It is that they really didn't have any choice.

Similarly, with the census case, given the timing of the census and the fact that there was an injunction against using the citizenship question, the court really didn't have a lot of choice but to get involved in the issue and to add the citizenship issue to the case.

So I think the watch word for this court term is ERISA. I mean that only half joking, but I think the court by and large is trying to take cases that are lower profile cases, cases of statutory interpretation, cases that are not necessarily designed to end up on the front page of the newspaper or to divide the court five to four. And I do think that part of that is just the accident of which cases come in any particular term, but I do think part of it is a conscious effort to turn down the heat and stay away from some of the hot button issues.

So let me talk about three particular cases or issues that I think are both interesting and have implications for states, state courts, and state's rights. The first is a case I argued about 48 hours ago, which involves partisan gerrymandering.

The court had two cases in front of it, one coming out of North Carolina and one coming out of Maryland. I was involved and argued the North Carolina case. It may not be an accident, that the court had these two cases and one of them involved a gerrymander that favored the Republicans, and one of them involved a gerrymander that favored the Democrats.

If the court decides to get involved in policing partisan gerrymandering, it's convenient to have one of each so it seems like the Court is being evenhanded. On

the other hand, if the court is going to stay out of the business, it's convenient to have one of each so it doesn't seem like the result necessarily favors the Republicans or the Democrats in that particular instance by staying out of the case. So it may not be a complete accident that the court had the two cases in front of it.

It actually had two cases in front of it last term. Last term it had a Wisconsin case with a legislative map which favored the Republicans, and it also had the Maryland case in an earlier iteration with a map that favored the Democrats.

In some respects one of the most interesting things about the argument was how interested the justices seem to be in whether or not there was another possibility out there for policing partisan gerrymandering, essentially the question of whether the courts really had to get involved because there were no alternatives or whether there were other alternatives out there.

Justice Gorsuch in particular asked about whether or not the initiatives that were passed in a number of states, including in Michigan, in which the states would provide some role for a bipartisan or nonpartisan redistricting commission, could not be part of the solution to this problem and could provide a mechanism for the court not to have to get into policing

the problem. I also sense that the court, as it dug into these cases, got an appreciation for how different the resolution of gerrymandering is from state to state.

In the North Carolina case, for example, as a matter of state law, the governor has no real role in redistricting. Unlike most legislation in the state of North Carolina where a bill is approved by the House and the Senate and then the governor gets the opportunity to veto it, redistricting legislation is effectively one of the reasons why you can have a map that favors the Republicans in the House and the Senate even though there's currently a Democratic governor in North Carolina.

By contrast, in Maryland it turns out that the governor is directly involved in the redistricting process and is really pretty much by state tradition the first mover in proposing a new congressional map. Thus, it will be interesting as the court sorts through this issue how much they rely on the possibility of the states coming up with their own solutions to this issue and how much, if at all, they avert to the fact that the states, through their own laboratories of democracy, come up with very different ways to go about doing the districting in the first instance.

The other thing about this case that will be fascinating is that it will give a read on the court's

view about the proper role of the courts. I think from the arguments, one thing that was pretty clear is that at one level or another, all nine justices recognize that partisan gerrymandering is a "problem", loosely speaking, but where the court seems to divide, and it will be interesting to see where they ultimately divide, is it a problem that the courts have the tools to solve given that the constitutional text doesn't address the issue directly, or is this something that the courts really don't have the tools to solve?

How the court wrestles with that and resolves that will tell us a lot about how all of the justices, but especially the two new justices for whom we have the least data, approach this question of the judicial role when the Constitution doesn't really address the particular topic directly.

The last thing I'll say about this case is that it puts an interesting spin on what I was mentioning about the chief justice as the governor switch and as an institutionalist. This was underscored by some of the questions the chief justice asked in the partisan gerrymandering argument last term.

The chief justice sees these cases as a potential source of difficulty for trying to convince people that what the Supreme Court does is very different from what the partisan branches and political branches of

government do. The chief justice seems acutely aware that it's important for the court's reputation to make people understand that what the court does is not just politics by other means.

Based on his comments, particularly in the Wisconsin gerrymandering case last term, he sees these cases as a source of concern because, as he put it at the argument, it's going to be very hard to convince the public when they look at these cases to think about these cases in any way other than did the Republicans win or did the Democrats win.

Another issue that's before the court this term also has local analog-namely, the question of who speaks for the state in litigation before the courts and the related question of who has the right to appeal when there's a decision against the state but various parts of the state, including the state legislature, are affected differently.

This is a case that I argued recently, and it's sub judice, so I have no idea how the court's going to resolve this. But the case started as one of limited interest to people outside of the Commonwealth of Virginia because it was a case about the last round of redistricting for the House of Delegates in Virginia.

What made it of broader interest is the question of who speaks for the state in litigation. This case has been back and forth to the Supreme Court a couple times, but in the most recent ruling the district court ruled that the 2011 House of Delegates map was unconstitutional.

The House of Delegates, which happens to be Republican but also happened to draw the map, didn't like the fact that their map was held unconstitutional, so they filed a notice of appeal, and they participated in the litigation throughout. But the attorney general, who had also participated as no more than a second chair throughout the litigation sent a letter to the Supreme Court saying, "Well, I don't appeal, and I'm the attorney general of the Commonwealth and I get to control whether any state actor files an appeal with the Supreme Court."

And so the question before the Supreme Court is, does the House of Delegates have appellate standing to appeal the decision, or are the only entities with appellate standing to appeal the executive branch officers (represented by the attorney general) with responsibility of actually enforcing the election law.

As I understand it, there's a similar issue with respect to the Michigan partisan gerrymandering

litigation where the secretary of state essentially tried to settle the litigation and the legislators were not so interested in having the litigation settled.

And so this is an important issue, particularly with divided government, which we have in a lot of states across the country. In those states, it is very important to figure out who actually speaks for the states in the court and does the legislative branch, if it's controlled by a different party from the executive branch, have an independent opportunity to take positions in the federal courts. So that's a case that the court will decide before the term is out.

The last case I'll mention is the recurring issue of kind of the interaction between the federal courts and state courts and federal law and state law, and that's the issue of preemption. The Supreme Court has a case called the Merck case that involves preemption in the pharmaceutical context.

There's lots of litigation involving pharmaceuticals. A lot of it takes the form of state tort law claims that sound in failure to warn. If you'd only told me that the side effects were not just this long but that long, I wouldn't have taken the drug, and so, it's a failure to warn claim.

There's a very odd and not terribly satisfying dynamic with preemption in this space, which is the Supreme Court cases have found that claims against generic drug companies are preempted, but claims against branded pharmaceutical companies are not preempted. And the rationale for that differential treatment is that the generic companies actually can't change the labels because they're just essentially copying the labels from the branded drug, whereas the branded drugmaker actually has control over the labels, so they can control the labels and, therefore are responsible in a more direct way for what's on the label.

This case comes up in the context of a branded drugmaker that tried to change the label and went to the FDA and said we'd like to change the label in this way and the FDA said no. The question is whether in that context there is a preemption defense for the branded drugmaker who tried to change the label.

The interesting thing about this case is maybe 10 percent what they say about this particular context, and 90 percent how the two new justices vote and, in particular, Justice Gorsuch. Because preemption, and particularly the doctrine of implied preemption, is not something where justices divide

along neat lines, where if you tell me which president appointed a justice, I can tell you how he or she will vote on preemption.

And one of the biggest divides on the court in recent years, at least in implied preemption cases, was between Justice Scalia and Justice Thomas. And Justice Scalia was somebody you'd describe as very pro-preemption and, tended to think that if there was a federal regulation or policy in the area, let's have one solution, not 51 solutions.

And one of the biggest opponents of implied preemption is Justice Thomas. I think the way to understand Justice Thomas' approach to this is he doesn't like implied anything. He doesn't like implied causes of action, he doesn't like the Dormant Commerce Clause because that's implied, and he doesn't like implied preemption.

And what's so interesting is if you look at Justice Gorsuch and his approach to cases in his first nearly two years now on the court, he really seems to like Justice Scalia and his approach to a lot of issues, and he really seems to like Justice Thomas in his approach to a lot of issues. And which of those two Justices' approach he favors in this particular area could really have a huge impact on preemption cases going forward.

If Justice Gorsuch takes the Justice Thomas view, it's going to be almost possible to win an implied preemption case in the Supreme Court. If Justice Gorsuch takes the Scalia view, then these cases will continue to be 5-4 cases that are closely divided. So that's one I think that's well worth watching.

Let me just highlight one or two things moving forward, and then I think we may have time for some questions. So as I mentioned, this is a term where the court is trying to turn down the temperature a little bit, trying to avoid some of the more controversial cases, and I think as almost a natural corollary to that, I think next term we will start to see some of the more high profile cases come up. It's the nature of the Supreme Court's docket that you can put things off a term or two, but there's only so long that the justices can put issues on the back burner or deny cert and wait for a better vehicle.

And you see that already in one of the cases that will be waiting for the Supreme Court at the very beginning of its docket next term involving the Second Amendment. It will be the first time the Supreme Court has said something about the Second Amendment since the McDonald case almost a decade before.

The court had its first two meaningful Second Amendment cases since the 1930s when it decided that there was an individual right protected by the Second Amendment in the Heller case, and then decided that that individual right also applies against the states in the McDonald case. It has said exactly nothing since.

In the interim, a lot of lower courts have decided a lot of cases in a lot of different ways and said different things about how to apply the doctrine, and the court had pretty consciously denied cert over some dissents from denial from Justice Thomas and Justice Scalia who urged the court to get back in and to provide some guidance. Now, the court has decided that it is going to say something more about the Second Amendment in the case arising out of New York.

The other issue that I think is one that's going to be worth watching and is kind of an ongoing saga, and I alluded to it with the travel ban case, is the question of when you can have a nationwide injunction. What you really have seen the last couple of terms -- and this is something that I experienced when I was in the SG's office back in the day -- a nationwide injunction, whatever else you think about it, puts a lot of pressure on the Supreme Court. When the federal government has a policy that applies nationwide, the question is whether a single district court judge should

be able to stop the policy in its entirety or only enjoin the operation of the statute in that judicial district.

You can think about that in a lot of ways and have different opinions about it, but the one thing that I don't think is debatable is that if you're going to allow nationwide injunctions, it will put a lot of pressure on the Supreme Court. The way the Supreme Court operates generally is issues don't get decided nationally until they get to the Supreme Court, and part of the way that the Supreme Court figures out which cases to get involved in is they wait for the regional circuits or the state supreme courts to look at the same issue and divide.

If they all look at it and all came out the same way, the Supreme Court will generally say, "That's great, we have enough cases, thank you very much." And they'll wait until the Sixth Circuit has decided this case diametrically opposite from the Seventh Circuit, as it doesn't make a lot of sense to have different rules in Chicago and Cincinnati.

But the nationwide injunction, particularly if it's imposed by district court, short-circuits all of that, and all of a sudden a single district court, sometimes before even a single circuit court has looked at the issue, has basically decided nationwide that a

government policy is unconstitutional and should be stopped in its tracks.

And what you've seen is because of those nationwide injunctions against a number of the president's executive initiatives, it has forced the Supreme Court to get involved -- sometimes by vacating stays, sometimes by issuing stays of orders much earlier than is normally the case.

As I watch the interactions between the solicitor general's office and the Supreme Court, I think the current solicitor general has asked for more emergency orders from the Supreme Court in two years than I saw happen in the seven years that I was in the SG's office during the Bush administration.

And I think a big part of that is certainly that the executive branch has some controversial policies, but the other big part of that is this tendency toward nationwide injunctions, and I think the Supreme Court is probably going to have to say something about that practice in the next couple of years.

The last thing I'll say before wrapping up is that the other big issue to watch and this is I don't think any great insight if you paid any attention to the Kavanaugh hearings or really any Supreme Court justice's confirmation hearings over the last couple of years the

question of stare decisis, which I think will loom particularly large going forward.

There are a couple of cases before the court this term, none of which have been decided yet, that while not involving huge front page issues, do involve stare decisis and express efforts to get the court to revisit one of its precedents.

It will be kind of telling to see how the court deals with stare decisis and precedent in the context of these less high profile issues and what it says about the court's view about how quickly it wants to abandon a position that the Supreme Court has previously taken.

And if you put that together with my observation about Chief Justice Roberts, I think the real question going forward is going to be whether this court is going to move quickly to overturn some cases that have been on the books a long time, or is this court going to move relatively slowly and relatively methodically?

I'll end with the observation that if you've watched Chief Justice Roberts over his time on the court, his position is an interesting one because it is not that he is not willing to overrule precedent, but he really does like to proceed in a very methodical way when it comes to approaching precedent.

The Janus case that overruled the Abood case is a good example because the Supreme Court, a few terms before it was ready to overrule the Abood case, had another case in front of it coming out of Illinois where the court didn't overrule Abood, but made clear to everybody who could read that Abood was on life support. And so you had this phenomenon that by the time the Supreme Court actually overruled Abood, it was almost old news. Everybody had almost adjusted to the fact that there was, you know, a problem with Abood.

And he did something very similar in the context of the campaign finance laws where, in Citizens United, the court had a case that was up there mostly on a very small-bore issue, and then they called for supplemental briefing on the constitutionality of the statute more broadly and whether the court should overrule another Michigan-oriented case, Austin against Michigan Chamber of Commerce.

Again, by the time the court ultimately overruled the decision, the court had signaled that was the direction it was going, and so the decision I think was, at least in the chief's mind, a little bit less jarring. And so that may be something to watch for.

It could have something to do with cases that involve Michigan, I don't know. I mean, Abood, Austin. But I think it probably has more to do with the chief's overall methodology. So thank you very much for your attention. I appreciate the chance to be with you.

(Applause)

MS. MASSARON: So if you have questions, put them on a card and hold them up. And while I'm waiting to see if anybody does, I have a question that I think people will be interested in hearing, and that is, you were in the solicitor general's office for many, many years. Some of us know something about the SG's office and its work and its reputation as the tenth justice. I just wonder if you could share a little bit about that office, its role, whether it's changing in any way.

MR. CLEMENT: Sure, I'd love to talk about it. The solicitor general's office is something that is probably not that prominent in the minds of most nonlawyers. I think most nonlawyers when they hear about the SG, they probably would wonder whether that is the person who puts the warning labels on the cigarettes? No, the solicitor general is different than the surgeon general.

But the office for lawyers and, particularly, for court watchers is a critical office because it's the office that represents the federal government in the Supreme Court of the United States, and the office is involved in fully 80 percent of the court's merits cases.

So year in, year out probably 30 to 40 percent of the cases involve cases where the federal government is a party, but even when you have cases where the federal government is not a party, in the vast majority of them, the federal government appears as amicus in the case.

A lot of the bread and butter of the Supreme Court's docket consists of federal statutory cases. I made the joke about ERISA, but there's some truth in that. The cases involving race, abortion, gerrymandering; they get all the attention and all the headlines, but the real bread and butter of the court's docket are cases involving the interpretation of federal statutes, some very important federal statutes, some fairly obscure.

The case I'm arguing next month is about the OCSLA, the Outer Continental Shelf Lands Act. I'm sure many of you have heard about that. Delighted to talk to you about it afterwards. But that's the kind of case

that the Supreme Court decides day in, day out when they're hearing cases.

And once you have the case in front of the Supreme Court, if it's a private party case and the federal government has not previously taken a position, I will tell my clients that the single most important thing that can happen between the grant of certiorari and the day of argument is not necessarily the brief we file or the brief the other side files. It's whether or not the federal government decides to file an amicus brief and whose side they decide to file on.

If they file on our side, we're having a great day and there is an excellent chance if you look at it statistically that we will prevail; and if they file on the other side, we have a very steep road to climb. So the office is very, very important to those who practice in the court.

I think the relationship between the office and the court is very, very important. And I think the relationship right now is a very healthy one and a very good one, but I do think that, this phenomenon of nationwide injunctions and emergency does put some pressure on that relationship.

One of the things that the court does, which shows you the special relationship between the court and

the solicitor general's office, is about 20 times a year in a private party case, instead of the court saying we're going to take this case and add it to our docket or we're going to deny cert, instead they call for the views of the solicitor general. They don't call for the views of anyone else, but they care about the institutional opinion of the executive branch of the United States.

And if the justices thought that what they were getting was not the institutional views of the United States and the long-term sort of position of the executive branch but just getting the latest views from the political side of an administration, they would stop calling for the views of the solicitor general, and I think you'd see a dip in the numbers.

And you haven't seen that, and I think that's a barometer of the health of the relationship. And based on that and everything I've seen, the way the solicitor general is received in argument, I think the relationship right now is very healthy.

MS. MASSARON: So I have three questions here that are sort of prognostication questions, and so we'll run through those. Do you have any insights on the dual sovereignty double jeopardy case? I don't practice criminal law, so I don't even know what this is about.

MR. CLEMENT: Well, I filed an amicus brief in the case, so I have a rooting interest in it, so I can tell you what I hope.

MS. MASSARON: Okay. I'm good with that.

MR. CLEMENT: I hope the Supreme Court gets rid of the dual sovereignty doctrine. It doesn't make much sense. If you think about what double jeopardy means as a common sense matter, the fact that, whew, you've just been acquitted, good news. Bad news is you've just been indicted for the exact same crime by another sovereign. That sure sounds like double jeopardy to me. This is, however, one of the cases I alluded to where the court is being asked to overrule one of its precedents.

And just to show you that criminal procedure cases are not really political in the left/right sense, the two justices who had written separately to suggest that the court revisit its double sovereignty doctrine were Justice Thomas and Justice Ginsberg, and so you'd think if that's all you knew and they were both into it and the court granted review, you'd think that it was almost a shoe-in that the court was going to overrule the doctrine.

But two things cut the other way. First, some of the justices seemed reluctant because they seemed to like the safety valve of having the federal government bring a civil rights prosecution after the state courts

fail to convict somebody, and that's obviously the most sympathetic context. On the other hand, I might say that's the most sympathetic context for not having a double jeopardy clause as opposed to a reason to ignore it based on the dual sovereignty doctrine.

But in any event, I think some combination of that concern and concerns about stare decisis may cause the court to reaffirm the doctrine, despite what I thought was an excellent amicus brief.

MS. MASSARON: What's the future of Chevron Deference? A sort of perennial Washington question in particular.

MR. CLEMENT: I was actually going to mention that, but I wasn't sure how much coffee was in the pots because it's not something that everybody finds fascinating. Chevron Deference is however something that I think both of the two new justices are very interested in. I think there will be a lot of activity in the administrative law space.

If what you're asking is whether Chevron will be overruled, I wouldn't hold your breath for that outcome because Chevron is not a case you really need to overrule. It's a little like the Lemon test where you could overrule the Lemon test, or you could just ignore it. And it's so much easier for the court to just ignore

it that despite 30-plus years of litigants calling for the overruling of *Lemon*, the courts never really had to.

I think you'll see something similar with *Chevron*, which is I think agencies will get less deference, but I don't know that, you're going to see the opinion that says *Chevron* is hereby overruled.

MS. MASSARON: So I have a couple questions left, but I'm just going to ask one because we're really approaching the end of our time. Do you anticipate that Justice Kavanaugh will vote in an area or on an issue that will surprise those who expected him to be a reliable conservative?

MR. CLEMENT: And the answer is absolutely. Which one and how surprised they will be and whether they really should be surprised is the harder question. After all, a lot of people have different views about what is a conservative justice or a conservative jurisprudence.

For example, were people surprised when Justice Scalia voted that there was a First Amendment right to burn the flag? Some people probably were, some people probably weren't because they'd read through all the threads of his jurisprudence. And is it a conservative result that he reached or a liberal result or none of the above?

But I do think there will be positions Justice Kavanaugh stakes out that will surprise people.

I also think that there will be important issues where Justice Kavanaugh and Justice Gorsuch will take different positions, and I would say that at the end of the day that shows they're both doing their jobs.

There is a major division about how to approach certain very important issues, about how to interpret the Constitution. As I alluded to about the partisan gerrymandering cases, at some level it's a case about what do you do when there's something that's perceived to be a problem and the constitutional text doesn't address it directly? Do you move the constitutional text to address the problem, or do you point out that the text doesn't address it and somebody else has to address the problem?

So there are broad strokes where I think the two new justices will have a similar approach, but as you get to the application they may differ. For Example, if I had to guess, I would say that Justice Kavanaugh's going to be much more attracted to the Justice Scalia view of preemption and, if I had to guess, I wouldn't be surprised if Justice Gorsuch is attracted to the Justice Thomas view.

I don't know which position is more conservative, but for those of us that make preemption arguments, it's sure to make a big difference. Thank you very much.

MS. MASSARON: Thank you very much.

(At 2:06 p.m., presentation concluded)

IV. Law Practice Breakout Sessions

A. Criminal

1. Expanding the Facts on Appeal: Motions to Remand and Judicial Notice

a) For what reasons are you seeking remand?

Typically, defense counsel are the ones bringing motions to remand. A few reasons were common: to preserve guidelines scoring errors, fleshing out sidebar conversations that were not put on the record, making a record for shackling claims, and, most frequently, developing a record for ineffective assistance of counsel claims.

Where there is a need to settle the record because of a lack of clarity in the transcripts, practitioners sometimes run into difficulty, depending on the county, with securing or viewing video of a trial; a court order from the Court of Appeals could facilitate making that easier for counsel of both sides.

For ineffective-assistance purposes, there was some agreement in the defense bar that it was rare that a remand is unnecessary. There are occasions where the only fact question is whether a decision was strategy or not. Because of the presumption under the law that a decision is strategic, the defense bar feels they must file to create a record to rebut that presumption. A prosecutor responded that because the inquiry into the reasonableness of counsel's strategic decision is an objective, rather than subjective question, it is not clear why a remand would be necessary to prove why the attorney, for example, didn't make a specific objection. In the ineffective-assistance context, moderators asked whether practitioners thought that motions to remand have been typically granted. The bar generally believed such motions were typically unsuccessful.

Moderators asked under what circumstances filing a motion to remand should not be sought by the defense. The general thought was that issues of ineffective assistance where the strategy is clear in the record need not be developed further.

b) Timing issues with dual jurisdiction in the circuit and appellate courts

There was a common concern about the dual jurisdiction for post-conviction motions in the circuit court and the time for filing a brief on appeal. Because the time period is short to file in the circuit court, often a motion to remand in the Court of Appeals is the only option because the Court of Appeals deadline can be motioned out the deadline before circuit court before jurisdiction is divested cannot be.

The moderators asked whether an expansion of the time for filing post-conviction motions is a good idea. Many from the defense bar agreed that an extra 56 days, for example, would help to allow for filing a motion in the circuit court before moving in the Court of Appeals to remand. With that expanded timeline, the Court of Appeals need not get involved where the circuit court can make a record. And for the defense, some issues require investigation that will take longer than the 56 days allotted to file in the circuit court. For example, getting discovery within 56 days is often very difficult, communication with clients may take time, and securing expert affidavits or reports takes time.

Securing a hearing from the circuit court might also increase the value of the evidence because the Court of Appeals might not act on a motion to remand for several months and witnesses' memories start to fade without prompt hearings.

Some prosecutors responded that whether the defense is filing a motion for a new trial within 56 days or in another 56 days, it would likely not affect how prosecutors handle the matter.

One prosecutor responded that, typically, post-conviction motions in the circuit court require a response within a week or so, which truncates the time period. The prosecutors don't mind the more leisurely pace in the Court of Appeals.

c) What kind of offer of proof might be sufficient to earn a remand?

The Court of Appeals judges present in the sessions were asked what kind of offer of proof they might be looking for to grant a motion to remand, particularly on claims of ineffective assistance. One responded that it is necessary to provide some factual basis and attempt to show that it was reasonably likely to affect the outcome. And, although an affidavit from an investigator saying what a witness said may be a proper offer of proof to support a motion to remand, it is substantially better to get a signed and notarized affidavit from the witness directly. This form of proof might give the Court some confidence that what is submitted might actually get into the record on remand.

The point regarding a showing of potential prejudice is critical because a fruitless expansion of the record is unlikely to be granted. In sum, tell the Court what was missing from the record, what you need to develop, and why it would have made a difference in the outcome.

Prosecutors expressed some wariness that an offer of proof might turn into a greatly expanded record on remand, so that the proceedings go beyond the focus of the offer of proof. Prosecutors want some certainty of the scope of the proceedings on remand.

d) If the Court denies a motion to remand, what is defense bar to do?

Recently, the Court of Appeals' denial order of a motion to remand does so explicitly without prejudice, subject to the full panel's opportunity to remand upon submitting the case. According to the Court of Appeals judges at the sessions, the thinking behind this standard order change was that denial of a remand should not be considered law of the case. The full hearing panel will have full access to the record which might better be able to determine, even after oral argument, whether a remand is appropriate. A member of the Court of Appeals Clerk's office suggested that counsel argue for a remand at the oral argument. Another suggestion is to file a motion to remand once the oral argument is scheduled on the brief on appeal because once the hearing panel is set, motions get referred to that panel. In short, though the hearing panel has always had the authority to remand prior to issuing an opinion, the Court appears to be leaving it more open now.

e) Approaches to funding issues

The defense bar shared some concerns and possibilities for dealing with issues of lack of funding for creating an offer of proof. They expressed frustration with often being in a "no man's land" where there isn't a source of funding and the circuit court lacks jurisdiction—counsel can't go to the circuit court to seek funding that would support a motion to remand because the court no longer has jurisdiction

Some strategies where funding is lacking were discussed. Perhaps consult an expert with whom you have a working relationship and seek a shorter affidavit on a free or reduced basis. Counsel might also explain to the Court of Appeals that there are funding limitations at this time but that you have an intention to secure an offer of proof soon. This might suggest another reason for expanding the time period in circuit court as discussed above—allow the circuit court to look at it first. Another approach that has been successful is to use a similar affidavit in another case with similar facts, and seek money for an expert on remand to use that expert in this case. In light of the Supreme Court decision in *People v Kennedy*, 502 Mich 206 (2018), there may be greater opportunities to secure more funding.

f) What discussions should defense counsel have with prosecutor prior to having the hearing?

Generally, according to prosecutors, it behooves defense counsel to reach out to the prosecutor's office early to facilitate getting dates, and potential stipulations. The prosecutors encouraged defense counsel to seek concurrence to remand for an evidentiary hearing; prosecutors may be amenable depending on the facts of the case. Discussion of the scope of the

hearing is also appreciated by the prosecutors. Typically the remand order sets the limited issues to be probed on remand, though the precise witnesses may be in flux. Prosecutors will typically resist any effort to expand the scope of the remand proceedings. Consistent with that, one of the Court of Appeals judges stated that the Court will be cognizant of the focus of the remand, so if the circuit court permits new evidence unrelated to the specific issue identified by the Court of Appeals, it may not be of any utility to the defense given the Court's earlier decision to limit the remand to a particular issue.

Once the hearing is set, the attorneys should talk about exhibits and witnesses. This could both simplify it for the circuit court and result in prosecutors being amenable to stipulations rather than if the exhibits were a surprise at the hearing.

Where the Court of Appeals sets date limitations on holding hearings in the lower courts, as long as the litigants are corresponding with the Court regarding the process, the Court doesn't mind if the dates aren't met. Communication is key.

g) Changes in the substance of post-conviction hearings post *People v Johnson*

After *People v Johnson*, 502 Mich 541 (2018), the prosecutors understand that there is a lower bar for newly discovered evidence. Prosecutors may want to bring in new evidence at a post-conviction hearing to meet a defense's new evidence for determining whether the evidence could affect the outcome. Now, prosecutors are incentivized to do further investigation and further question witnesses' credibility during proceedings for post-conviction relief. For example, recanting witnesses might be met with testimony from an investigating officer rather than mere cross-examination. The prosecutors expect an increase in grants of new trials based on newly discovered evidence post-*Johnson*. The defense bar responded with a concern that these might turn into mini-trials.

h) Miscellaneous

Discussion was also opened up to anything the bar had thoughts about. The subject of published and unpublished decisions came up. One of the Court of Appeals judges expressed a concern about publishing where a particular issue warrants publication, but other issues raised may not have been properly briefed leading to a risk of publishing an opinion that includes discussion of an area of law without the due care we would expect from a published opinion. This is an unintended consequence of more frequent publication.

The judge also suggested litigants to tell the court there are no published opinion on point in the briefing and cite the applicable court rule regarding publication. The bar had a concern that the Court of Appeals is not often noting where there is disagreement among unpublished opinions. That would be helpful to the parties to provide some direction.

The judge suggested that requests for publication should either be in the brief or done at oral argument. Post-hoc letter requests are not universally favored. Counsel expressed a worry that it may be against a client's interest to request publication. Either the decision itself will be against client's interest or it will create a higher likelihood of application for leave in the Michigan Supreme Court.

2. Evidentiary Standards and Changes in Technology

Practitioners in attendance discussed what effect video evidence should have on the standard of review in the appellate courts. The moderator pointed out that this is not really a prosecution/defense issue as each side has potential to be both helped and harmed as a result of any change in the standard of review.

There was much discussion of the Court of Appeals' decision in *People v Kavanaugh*, 320 Mich App 293 (2017), where the Court rejected the trial court's finding that a search of the defendant's vehicle was reasonable. In reaching this conclusion, the Court reviewed a video of the stop and concluded that the video contradicted both the officer's testimony and the trial court's findings. The question posed to the practitioners at the sessions was whether the Court of Appeals improperly failed to defer to the findings of the trial court. More broadly, the question presented in the session was whether the increased availability of video technology might justify a departure from the clear error standard in reviewing trial courts' findings of fact in favor of something more closely resembling a de novo review in some instances where the video seems to speak for itself.

One practitioner also noted the dissent in *People v Anthony*, COA Docket No. 337793, which relied on a video that appeared to contradict an officers' testimony that the defendant's vehicle was illegally parked. Others expressed concerns that the application of *de novo* review, even in light of the accessibility of video evidence, would open up all sorts of opportunities for the appellate courts to improperly second guess the trial court. One practitioner made a comparison to the Super Bowl, in that a play can be reviewed from multiple different angles, which sometimes appear to contradict each other. It was noted that appellate courts rarely have the variety of angles to review as is available to a Super Bowl referee, and therefore more deference is warranted to the original factfinder, who is able to see, hear, and judge the credibility of the testimony provided. It was noted that as cameras become more ubiquitous, this issue will come up again and again.

Another practitioner pointed to *Love v State*, 73 NW3d 693 (Ind, 2017), to show how other states have applied the clear error standard in light of video evidence.

On the topic of videos, another issue that was discussed was the ability of the court and of other practitioners to actually view the video. Often police dash cams and body cams download to a format that is not readable by non-proprietary video applications. It was suggested that when providing video to the court, practitioners should also include a video player that is capable of playing the video.

Practitioners also discussed the role of video transcripts as opposed to written transcripts. The question was raised whether appellate counsel should be expected to review the video transcript if one is available. One practitioner pointed out that the purpose of using written transcripts is to facilitate quicker review of the record by appellate counsel and that review of video in every case would be unreasonably time consuming. The consensus of the group was that, while there are cases in which review of the video is appropriate, it is not necessary for practitioners to do so in every instance. One specific example involves cases in which the trial judge's demeanor may be indicative of judicial bias; however, sometimes the judge's words are enough in themselves to reflect misconduct. One practitioner pointed out the difficulty for trial

attorneys to make a record of the trial judge’s body language, which sometimes may cause the attorney to hold back on an objection. Several practitioners, as well as a Court of Appeals judge in attendance stressed the importance of making a record and “making the judge say no.”

Another issue that was discussed in this regard was the admission of videos at the trial level that are deemed inaudible by the transcriptionist. In these cases, it is often important for practitioners to get access to the original video, which is often audible, even if the video transcript is not. It was also pointed out that sometimes written transcripts will simply say that a video was played without an attempt to transcribe it.

Several practitioners and judges in attendance suggested the possibility of a rule requiring the trial court to disseminate the video transcript when it is available, but perhaps subject to an order that the attorneys may not further disseminate the video except for limited circumstances. In this sense, the video is shared with counsel under restrictions similar to those associated with carehouse videos. Among those in the session, there was widespread support for considering such a rule.

Attendees also discussed whether MCR 2.613(C) should be set aside when there is clear video evidence that the trial court was wrong. Although it was suggested that *Kavanaugh* seems to open the door for more aggressive clear error review, the consensus was the clear error is still the appropriate standard of review.

One practitioner asked about whether it is appropriate to use video as an offer of proof in a Motion to Remand. The consensus was that this use of video is generally appropriate. It was also suggested that, following a Motion for New Trial, where a trial judge refused to look at a video of an allegedly false or involuntary confession, it would be appropriate for the Court of Appeals to review the video.

There was also discussion about the emerging science about credibility determinations. Even though an appellate court might be inclined to use video transcripts to review witness demeanor, facial expressions, etc., these are notoriously poor indicators of whether a person is being honest. Of course, this is equally problematic to the extent that trial courts also rely on these factors in determining credibility.

Finally, a distinction was made between the use of video in objective as opposed to subjective determinations. For example, it would be less appropriate for an appellate court to judge the credibility of a witness based on how they appear on video. On the other hand, if the question is “was the defendant in handcuffs in front of the jury,” this is an objective fact that can often be proven or disproven by reference to the video.

3. Offense Variables, Juvenile Lifer Resentencings, and Other Fact-Intensive Sentencing Questions

a) Presentence Investigation Reports (PSIRs)

Generally

Prosecutors indicated that the thoroughness by which prosecutors review PSIRs and scoring varies greatly county-to-county. In some counties, prosecutors merely recognize their opportunity to review the PSIR, but do not review PSIRs in every case. In some counties, prosecutors do not evaluate each guideline scoring to determine if it is accurately scored or not.

Offense Variables

Particular offense variables that attendees discussed frequent challenges in scoring include OV 10 (Exploitation of Vulnerable Victim), OV 14 (Offender's Role), OV 19 (Threat to Security of Penal Institution or Court or Inference with Administration of Justice or Rendering of Emergency Services). Concerns are that the way the variables are currently worded, there's an argument that almost any real person could be a vulnerable victim; that everyone in a conspiracy/cooperative crime could be a leader in some aspect of a crime; and that there is a wide variety of conduct ranging from large to minimal inference that could be scored as "otherwise" interfering with or attempting to interfere with the administration of justice. One participant felt passionately about OV 14 with regards to one older individual and multiple younger offenders where the younger offenders were clearly acting in conformity with what they were advised to do by the older offender, but "took the lead" on the commission of the crime and were scored as such. Consensus at both sessions was that the scoring of OV 4 (Psychological Injury to Victim) had largely improved related to an opinion on point related to such scoring. Prosecutors have taken more effort to seek evidence related to such while some defense attorneys indicated they believed the scoring of such was still too broad.

Some counties present explanations for their scoring of variables in PSIRs while the large majority do not. There was consensus that some explanation would be beneficial at the trial and appellate level.

Judges present urged challenges to the guidelines as the Court of Appeals will not hesitate to overturn a sentence and order resentencing based on offense variables. Prosecutors reminded those present that prosecutors can argue increased offense variable totals on resentencing and have the opportunity and motive to provide proofs related to such.

There was consensus that the legal framework and the sentences everyone is seeing has not changed much since *People v. Lockridge* that was decided shortly before the previous bench bar conference. There are few out-of-guidelines sentences now that would not have also been out-of-guideline sentences before. One individual posited that victim impact statements and the presence of television cameras tend to affect sentences.

The advantages of bringing them up with the trial court (such as quick correction/agreement by the prosecutor's office) and disadvantages of bring them up with the trial court (such as expiration of the time periods to raise other issues) were discussed. Court staff raised that bringing them in the trial court more properly preserves them for consideration by the Court of Appeals.

Agent's Description of Offense

There was a general concern lodged with regards to information that was neither admitted nor proven beyond a reasonable doubt being included in the PSIR and its effect on

MDOC classification, programming, and other aspects. This was most poignant with regards to the Agent's Description of the Offense which is accepted "as gospel" by the Michigan Department of Corrections. An example was given where an individual was charged with an assaultive crime against a significant other and criminal sexual conduct against the same victim. In recognition of issues with proving the criminal sexual conduct claims, the prosecutor's office dismissed the criminal sexual conduct charges against the defendant in exchange for a plea to the assaultive crimes. Because the criminal sexual conduct claims were in the police report, they were included in the PSIR and the trial judge refused to strike them – although adding that the defendant refuted the claims. As a result of their inclusion, the defendant was ordered to attend sexual offender programming (although dismissed from the case) and precluded from domestic violence programming (which was pled to and needed based on the defendant's admissions and history.) Failure to complete sexual offender programming or denying the sexual assault occurred would likely result in the defendant being denied parole. This is typical with other types of information in the PSIR that was neither admitted nor proven beyond a reasonable doubt – including information that was disproven or drawn severely into question at the preliminary examination or other evidentiary hearing. A discussion was had as to what could be done to correct the error. Suggestions included having a more effective write-up based on the plea, having the prosecutor write it, a joint representation of what happened from the parties, and other remedies. No one solution was without concerns and no solution received consensus.

Regarding what action should be taken regarding the agent's description of offense, it was discussed that these challenges should be brought up to the trial judge to strike information not proven. Most judges are refusing to do so unless consented to by parties, some add language that the defendant disputes the events, and others refuse to act as the write-up accurately reflects what the agent thinks happened based most often on the police reports. Prosecutors indicate they're hesitate to counter victims who still claim certain actions occurred even if unrelated to the current charges, but they also do not want the report to be wildly inaccurate. Defense attorneys are reluctant to cede certain unpled to activities occurred as the trial court may consider such in sentencing the defendant. Individuals associated with the Michigan Court of Appeals acknowledged that corrections to the report are seldom made and unless it is outcome-determinative on the direct consequences of defendant's punishment (such as jail time, guidelines, etc.) the Court is unlikely to act to remedy such. Consensus was obtained that it would be best if the Michigan Department of Corrections changed policies to recognize this difficulty. An alternative would be to explain this situation to judges who are often reluctant to strike the disputed language.

Timeliness and Availability of PSIR

It was acknowledged that PSIRs only need be available 48 hours prior to sentencing. In some counties, trial court judges set a presentencing conference a week or two ahead of time to review the report with the parties and prepare for appropriate proofs on the day of sentencing. Some judges require written challenges to PSIRs and require such in advance so that they have time to research the issue. In other counties, a chance to review the report and provide feedback a half hour to few days before sentencing is provided. In other counties, defense attorneys often pick the report up shortly before sentencing and review the report with their clients briefly. There was concerns that 2 days is not enough to write a brief or get witnesses or other evidence to shore up disputes. Prosecutors and judges in some counties are often open to adjournment of

sentencing to allow for more time, but with incarcerated individuals in several circumstances may not wish to adjourn sentencing. One county had online accessibility to PSIRs for prosecutors but did not have reciprocal access to defense attorneys. A suggestion was made to send out the prospective scoring of the guidelines earlier in the process and via less secured means to allow for more time to allow for challenges and/or proofs.

Other Issues with the PSI

PSIRs now typically rely on the statements of defendant and complainant rather than involving actual investigation of the facts at issue. There's a concern this may affect accuracy of the reports and valuations of restitution involved.

It was discussed that PSIRs were often difficult to get since most courts refuse to send such out via email (even if encrypted and secured) or via fax. This is less of a concern with local counsel, but counsel is out-of-county, it can be difficult to pick up a PSIR when first available.

It was discussed that attorneys who are handling 40-50 sentencings may not have enough time to review the reports in-depth with their clients. Furthermore, some spaces do not have acceptable and private space to provide the report to the client or read it aloud to the defendant in an acceptably private location – instead being forced to read it at the door to the cell the defendant shares with multiple other defendants including intimate and private details of their life including history of abuse, medical information such as past substance abuse and treatment, etc.

Concerns were expressed that conditions of probation or to parole are not consistent with the truth. Examples were given of: (1) drug dealers being sentenced to drug treatment though they themselves did not have any drug addiction issues; (2) repeated domestic batterers pleading to something else and not receiving batterer's intervention treatment.

Multiple concerns were made related to COMPAS. Some indicated that the COMPAS scoring is being considered for admissions to treatment courts and appearing uncharacteristically low and excluding participation from otherwise suitable candidates. It was also discussed that this is based on past conduct in attempting to predict future problems based on needs and reached falsely inflated needs based on otherwise positive facts – such as an individual checking themselves into inpatient treatment with transition to a halfway house prior to sentencing resulting in a finding of home instability because they had lived at their current residence less than one year – despite living at their current residence for a long time prior to checking themselves into treatment – a positive step. Finally, concerns were voiced about the proprietary nature of the scoring and that it is not publicly available to understand.

b) Juvenile Life Resentencings

The general outline for juvenile life without possibility of parole cases was given. There have been 363 cases with 200 still to be resentenced. SADO offered to provide the numbers related to how many prosecutors sought to provide information on how many prosecutors were seeking the defendant resentenced to life without parole compared to a term of years sentence in response to judicial inquiry regarding such. It was acknowledged that there are many issues still unresolved by the Michigan Court of Appeals and Michigan Supreme Court related to aspects of

the law post-Skinner/Hyatt. SADO shared its experiences with these types of hearings and results including 5 of 5 defendants receiving term of years sentences since Skinner. It indicated there are 96 more contested hearings it has currently with three decisions outstanding. The other 100+ hearings are being handled by MAACS, court-appointed attorneys, or retained attorneys.

It was brought forward that Michigan has the highest proportion of offenders on whom life without possibility of parole sentences were sought. SADO identified three key reasons they believe that's the case: (1) Mandatory life without parole for felony murder which is unique; (2) Age of adulthood is 17 instead of 18 which is unique; and (3) Aider and abettor or some accomplice liability means we have a larger proportion of these cases than other states. Some prosecutors indicated that some counties are not seeking life without parole where the offender is not the primary assault thereby excluding individuals under (3). Prosecutors indicated the following are important aspects when considering who to file a motion to seek life sentences without possibility of parole on: (a) Meeting with the victims; (b) How involved the defendant was in the murder; (c) What were the circumstances; (d) History of conduct in the Michigan Department of Corrections; and (4) The severity of the circumstances of the murder. It was indicated by comparison that Minnesota, Indiana, and Wisconsin had a combined 16 individuals upon which life without parole was sought. Appeals from resentencings pursuant to Miller are likely to continue to be a large amount of appeals.

Defense attorneys indicated we are expending substantial resources at these resentencing hearings related to experts for some of the following: (1) Juvenile brain development; (2) Michigan Department of Corrections records; (3) Gang violence; and (4) Other topics. Judicial staff indicated that explanations of Michigan Department of Corrections policies is very helpful. The rules regarding placement minimum for life offenders (level II) and eligibility for programming is very important. One defense attorney indicated that no testimony was required for these hearings, but this opinion was not shared by other defense attorneys present. It was stressed by some defense attorneys how important it is to spend time with clients and research independent of such because it's important to earn client trust and There was also a dispute about whether individuals receiving more than the minimum 25 year sentence were "automatically" appealing or not. Some defense attorneys indicated usually not while some prosecutors indicated usually yes. There was great disparity in perception of how many are getting different sentences as well. Counties differed greatly on their pre-screening process with which offenders should receive a term of years and which offenders life without parole should be sought on. Court staff inquired why prosecutors would oppose a term of years sentence if they were not the principal offender and no one was present who defended such practice. It was acknowledged that these resentencing hearings are emotionally wrought on all sides. There was concerns expressed that judges are considering aggravating factors rather than only mitigating factors. There are disputes about whether the victim has a say in whether the individual gets a term of years and whether there should be a bifurcated hearing.

4. Stating the Facts in the Statement of Facts

This criminal law breakout session featured a wide-ranging discussion about the do's and don't's (and the maybe's) of a good statement of facts.

First, several participants suggested that a good factual statement begins even before the statement of facts. Early components of the brief like the Issues Presented section prime the

reader, helping them digest facts that they read in the factual recitation. Similarly, some suggested that a preview of the legal arguments also helps the reader understand the relevance of the facts as they read them. Special emphasis was given to introductions, either as a stand-alone section that is no longer than a page and a half or as a preface in the statement of facts. Good introductions synthesize the most salient facts with the legal issues, providing the reader a roadmap, not only for the brief in general, but for factual recitation that follows. Several participants cautioned that this section should be set off from the factual recitation to minimize argumentative advocacy in the factual recitation.

Second, there was near universal agreement that the optimal format for a statement of facts was a story-like, chronological narrative. There was a similar consensus that the witness-by-witness approach—what one person called the mini-transcript approach—was not helpful. Some participants suggested variations on chronological approach. One suggested lumping certain witnesses together, for instance medical experts or responding law enforcement officers, even if their roles were not close in the chronology. Another suggested synthesizing duplicative testimony, using as an example several eyewitnesses who saw the same event and provided materially similar testimony.

Although there was general agreement that the statement of facts should tell a story, a schism emerged over what *kind* of story the writer should tell. One criminal defense practitioner stated that her goal in drafting the statement of facts was to make the reader feel that her client has suffered an injustice and want to do something about it. That story often (though not always) focused on the facts of the court proceedings, not the crime. On the other side, one appellate prosecutor stated that his goal in drafting the facts was to convince the reader that the defendant is guilty, a goal usually accomplished by emphasizing the facts of the underlying crime.

This discussion spawned a rich debate about whether it is appropriate for prosecutors to recite the more salacious facts of crime when the issue on appeal is an unrelated question of law. Some advocates stated that such facts were an unnecessary appeal to sympathy, while others responded that such facts are necessary if the legal claim involves a prejudice or harmfulness component. Court staff generally thought that naked attempts at appeals to emotion are not persuasive, but they also agreed that facts relating to the strength of the proofs are helpful in evaluating prejudice and harmfulness.

This division aside, both sides agreed that drafting a persuasive statement of facts was a balancing act. More than one person likened the statement of facts to a novelette, with the brief writer, much like the novelist, writing a story that produces a reaction in the reader (in the brief writer's case, an intellectual one). But the writer should avoid conclusory or overwrought language that risks turning off the reader. The goal, one participant suggested, should be to "show, don't tell." An exemplar of this approach: Justice Ruth Bader Ginsburg's opinion for the Supreme Court in *Yates v. United States*, 135 S. Ct. 1074 (2015), which, in the course of reversing a criminal conviction arising from the possession of fish under a certain size, provided factual details about how close the fishes' weights were to the cut-off, making the reader empathize with the winning party (the fisher).

In a related vein, there was rich discussion about what facts to include in a statement of facts. Everyone agreed that the statement of facts should include only those facts that are

relevant to the appeal. But beyond that, a more definite rule proved elusive. For instance, several participants agreed that dates are unnecessary—unless they’re relevant. So, too, with home addresses and, in many circumstances, names; it’s unnecessary to include that information—unless it is relevant. The best that could be said was that the writer should use their judgment to decide whether facts are truly necessary in a given case, guided by the admonition that the reader should not finish reading the legal analysis and wonder why they read certain facts. Often, this can best be achieved by writing the statement of facts after crafting the legal argument, as well as several rounds of editing.

The rest of the discussion centered on miscellaneous issues, including citations and the use of images. As for citations, everyone agreed that it is most helpful to provide record citations following every factual statement. The writer should global citations. Those who read briefs on tablets preferred in-text citations over footnote citations, as the latter forced them to swipe up and down while reading. One innovative approach to citations that the Court of Appeals’ prehearing research division is considering is making in-text citations a lighter font to help the reader’s eyes skip over less important text.

The group also discussed the use of images in the statement of facts. Several participants, including court staff, agreed that a photo or screen shot placed directly in the statement of facts can be effective. The same goes for maps, especially in cases where geography matters. But the group identified certain limits. First, graphic photos offered only to produce an emotional reaction from the reader should be avoided just as much as inflammatory statements. Also, writers should avoid adding images that are not part of the lower court record, especially if the purpose in doing so is to supplement the existing factual record.

B. Civil

1. Brief Writing: Basics and Beyond

a) Approaches to beginning a brief

- Outline
 - Draft argument headings
 - “Just start”
- Step 2:
- Draft arguments, then headings
 - Identify issues, then draft statement of facts
 - Draft statement of facts
 - Draft arguments, then statement of facts (rare)

b) Introduction to the brief

- Introductions of 1-2 pages are generally helpful

- Write an introduction twice – once before the rest of the brief and again after it
- Have a nonexpert (lay reader or other attorney) read the introduction
- Have a “theme”
- Think of the introduction as a form of “closing argument”
- Use bullet points

c) Statement of facts

- Use bullet points for undisputed facts
- Consider concurring in the opposing brief’s statement of facts
- Write a “story”
- Write chronologically, but do not include specific dates that are not relevant
- Use headings and subheadings
- Avoid argument in the statement of facts
- Be honest; it shows integrity
- Include only facts that are relevant to the issues in the appeal
- Include citations to the record
- A global cite at the end of a large factual statement is insufficient
- Citations within the statement of facts are acceptable but not preferred
- Footnotes are challenging to read in e-filed briefs
- But, reading a statement of facts is easier if record cites are not in the body
- Insufficient citations to the record cause the writer to lose credibility with the reader
- Including relevant maps, diagrams, photos, etc.
- Be sure that demonstrative exhibits get to the Court of Appeals

d) Standard of review and preservation of issue

- The standard of review is “integral” to the argument
- Weave specific standard of review or statutory interpretation rules into your argument
- Avoid block quotes for citations to the standard of review
- Be sure to include “preservation of the issue”

e) Issues and “questions presented”

- Draft questions presented first
- Appellee should follow the order of the appellant’s arguments
- Hyper-specific statements of issues presented are not well-received
- Judges consider the “questions presented” for waiver concerns
- But, overbroad issue statements are not informative or helpful to anyone
- The Bryan Garner-style “deep issue” approach has not been widely adopted
- But, detailed issue statements may be helpful if the area of law is unusual or highly technical
- Analysis and argument contained in the body of the brief are more persuasive than the question
- Confirm that questions presented parallels argument headings

f) Arguments

- Do not assume the audience (research staff or judges) are experts in the subject
- Background and analysis are very important
- Prehearing attorneys use ICLE books
- Start with statutory language if a statute is involved
- Use transition words but avoid overuse of them
- Attorneys should write their best to make sure the brief is readable and understandable
- Avoid personal attacks on opposing counsel, the opposing party, or the trial court

g) Reply briefs

- Reply briefs are usually helpful
- Focus on rebuttal rather than repeating arguments from the opening brief
- Most staff and judges read the reply brief(s) last
- Unless the appellant’s brief is not flowing well or explaining things well

h) Typography and format

- Times New Roman is a popular font

- Fully-justified and left-aligned are both used; some prefer “right ragged” for ease of reading
- Spacing after periods can be one or two spaces, but Michigan citation format uses two
- Bold type is often better for emphasis than underscoring or italics
- Prehearing reports use all-capital headings but some users find them harder to read in briefs
- The Oxford comma is widely preferred
- Some readers tend to skip over block quotes
- But, block quotes can be useful for key/major points of law
- Use a good lead-in sentence to a block quote, to get the reader’s attention
- External hyperlinks are typically not allowed in Court of Appeals’ e-filing

i) Editing and proofing

- Judges like short, concise, grammatically-correct briefs
- Contractions are not favored
- Parentheticals can be helpful if balanced
- Read your brief draft out loud.
- Put your brief draft aside and then come back and reread it the next day
- Give your brief draft to a colleague, or paralegal, to review and proofread.
- Use a Microsoft program function that will read your brief back to you, if you find that helpful.
- Print the brief draft out and then re-read it.
- Print a draft of the brief rather than editing entirely on-screen
- Read sections of the brief out of order

j) General suggestions

- Make a clear request for relief
- In an application for leave to appeal, emphasize the merits and rationale for relief requested
- An exhibit Index is helpful in trial court and required in the appellate courts
- Use bookmarks in .pdf files to bookmark briefs

Proposed rule revision:

Amend MCR 7.212(C) and MCR 7.212(D) to require an Introduction or summary of argument

2. Oral Argument: Basics and Beyond

a) Preparing for Oral Argument

- Reread the briefs
- Do a “moot court” practice
- Be prepared to tell the court why your side should win
- “Talk to the walls”
- Identify the hardest possible questions and try “answering” them out loud
- Focusing on key points
- Ask what you would regret not having said
- Distill the main points down into a digestible format
- Research the panel
- Find out if any of the judges has decided issues involved in the case before
- Prepare an outline and memorize it or reduce it to one page
- Prepare a summary of key cases
- Use a tablet computer during the argument
- Think about how you would want the court’s opinion worded if you prevail
- Think about those things you can’t concede at argument
- Oral argument contributes to client satisfaction that all avenues have been exhausted

b) Pre-argument questions from the panel

- Many attorney would appreciate having the questions ahead of time to help focus argument
- Judges do not believe it would be effective and would create more problems than it would solve

c) Correcting misstatements regarding the record

- Inform the panel if opposing counsel goes outside the record
- If a misstatement is material, correct it because it involves credibility
- Correct misstatements that are relevant

- Be diplomatic; do not accuse opposing counsel of lying
- Be prepared to provide record citations if asked
- Request a remand for further fact-finding if appropriate
- If a misstatement or expansion occurs during rebuttal, inform the panel quickly
- If supplemental briefing seems necessary, ask for it at oral argument

d) During the argument

- Take your cues from the panel
- Work hard to make oral argument a discussion
- Focus on one or two principles or arguments that are essential to the outcome of the case
- Sometimes an important or salient point is not emphasized enough in the briefing.
- You can begin by acknowledging you want to focus on something that was not emphasized
- Know when to make the right sorts of concessions
- Concede when you should to avoid frustrating judges
- Address questions directly
- Don't look only at one judge, even if that person asked the question that you're responding to
- Practitioners have difficulty with in-depth and odd hypotheticals
- Tell the court that you are going to pause to think through a hypothetical
- Ask the court to clarify or restate a hypothetical
- Be prepared to answer if an opinion should be published and why
- Tell the panel if the client is present, but the presence of the client does not affect the result

e) Facts unknown or outside the record

- Facts outside the record may provide context, if a judge asks for them
- Always indicate if a fact is outside the record
- Honesty is the best policy; be up front that you do not know but offer to supplement if necessary
- If asked about a fact outside the record, note that it is not in the record and ask whether to answer

- Sometimes a judge is simply curious how the case got to the court

f) Knowing when to sit down

- Sit down if the panel is not asking questions
- Do not continue to talk after the panel has exhausted its questions
- Perhaps take two minutes to summarize the case
- If there are no questions, ask the panel if it has any questions and, if not, sit down

g) Michigan Supreme Court arguments

- Think more about the law and less about the individual parties
- Use the “free fire zone” time to be certain issues are addressed and please the client
- The appellee can use the time to craft its response and identify key points
- Experienced attorneys waive the “free fire” time rather than repeat key points from the brief
- The number of judges makes it harder to manage questions
- Listen to several questions and answer them in a block if necessary
- Prepare for the justices’ talking to each other when they ask questions
- The appellant is always on camera.

3. E-Filing Nuts and Bolts

a) Case initiation and service

- Be sure the correct case initiation designation is used (claim vs. application)
- An application for leave to appeal from a dismissed claim requires starting a new case
- E-service is not initiated automatically
- Click on the temporary case number, which will route you back to the “case details” page
- From there you can search for, and add, other parties
- The e-filing system does not allow *ad hoc* e-mail service
- The opposing counsel’s e-mail address must be in the system already
- If an unregistered *ad hoc* email is used, it does not count as proper e-service

- Any service method permitted by the court rules will be considered “proper service”
- But, service by e-mail requires a stipulation by the parties to be filed with the Court of Appeals
- A stipulation for alternative service in the lower court is not sufficient
- Only individuals from the same firm can remove parties to be served
- If a “wrong” party is added to the service list, only that party can remove him or herself
- If you add a “wrong” party, you will need to contact him and ask him to remove himself

b) New appendix rule (MCR 7.212(J))

- An appendix should be filed as a “connected document” to the brief
- Many judges appreciate bookmarks in .pdf files
- Bookmarks should be “short but descriptive” (e.g., date and type of motion)
- It is extremely helpful when the brief and appendix are in a searchable format

c) Defect corrections

- To pay a second filing fee, get the docket number and use “defect correction - \$__” to pay the fee
- Attach a letter stating if you are paying an additional fee
- File a corrected pleading using “defect correction” without a fee

d) Record availability

- The Court of Appeals obtains the entire lower court or agency record
- Each office has a kiosk available for searching trial or appellate court records

4. Taking It Up – Applications and Appeals in the Supreme Court

a) Timelines for applications for leave to appeal

- The time for applications to the Supreme Court is one of the few “hard and fast” deadlines

- An order granting publication of a Court of Appeals opinion restarts the time
- “Bypass appeals” (before a Court of Appeals decision) are rarely granted
- Bypass appeals are only granted where time is of the essence, such as in election issues

b) Processing of applications for leave to appeal

- The clerk’s office holds the application the application, opposition, and any reply briefs are filed
- The application is then given to the commissioners’ office
- Two-thirds of the applications filed each year are filed in criminal cases

c) Commissioners’ review

- There are 18 commissioners
- Some commissioners have expertise in specific areas (tax, no-fault) and review those applications
- Otherwise, the applications are randomly assigned
- Commissioners usually review the Court of Appeals opinion; the application, response, reply and amicus briefs; and the record; in that order
- Possible recommendations are to grant leave, in whole or in part; deny leave; or take peremptory action
- If the recommendation is to grant leave in any part or take action, the case is put on the Justices’ conference calendar
- A recommendation to deny leave goes to the clerk’s office
- The justices receive a memo about every case

d) Consideration by the court

- The clerk’s office sends a regular list to the justices of “orders to be entered” — cases in which an order denying the application will be issued, based on the commissioner’s recommendation, unless a justice objects
- The justices’ clerks review this list and advise the justices if they think any of these cases should be scheduled for conference consideration
- Justices consider 20-30 cases per calendar conference
- If a justice requests, the case comes off the “orders to be entered” list and goes on to the conference agenda
- Otherwise, an order is entered denying the application

- e) **Factors that increase the likelihood of review**
- A published opinion of the Court of Appeals
 - A dissenting opinion in the Court of Appeals
 - Conflicting decisions in the Court of Appeals, whether published or unpublished
 - Issues of statutory construction
 - Issues that will affect many pending cases
 - Issues of first impression in the Michigan Supreme Court
 - Trial court split or confusion on the issue
 - National or regional media coverage
 - Amicus support for the application
- f) **Contents of an application for leave to appeal**
- Makes facts statement clear and concise, in chronological order
 - Include all relevant facts, including those adverse to the party
 - Omit irrelevant facts
 - The commissioner's report will point out any misrepresentation of a relevant fact
 - The justices' bench memos contain links to the record
 - Attacks on the other side or on the lower courts will reduce credibility
 - The application should explain the relevant industry or area of law as if to a beginner
 - The first audience, commissioners and judicial clerks, are generalists and/or young lawyers
 - Even the justices review so many areas of law they cannot be expected to be experts in any one
- g) **Amicus briefs**
- The best amicus briefs discuss the real world implications of a Court of Appeals decision.
 - There is no deadline for amicus briefs on applications
 - Ideally amicus briefs are submitted the same time, or immediately after, the appellant's reply brief

5. Fast Action – Motions, Emergencies and Unusual Cases

a) Emergency appeals

- “Fast action” issues jump out the attorneys and the court
- Most cases “speak for themselves” as to why they require expedited consideration
- Contact court staff as soon as it is apparent that an issue will require emergency review
- Advise the court when a filing that requires accelerated consideration is planned
- The staff can try to take advance action to shepherd the filing to a panel quickly
- In the Supreme Court, phone calls are also encouraged and appreciated
- “True emergencies” include trials in session, immediate evictions, foreign travel custody issues
- Alert the court to upcoming trials, pending evictions, and decisions required within a 56-75 days
- Motions for immediate consideration are recommended, to give staff added flexibility

b) Motions for immediate consideration

- A motion for immediate consideration allows staff to adjust deadlines if needed
- The case will get the court's full attention in the time allowed
- But, some of the usual work-up of the case may be sacrificed
- Immediate consideration may be requested at any time as the circumstances warrant
- Advise court staff of upcoming deadlines, impending trial dates, or changes of circumstances
- 60 days or so before the event that is generating the need for sooner review is recommended

c) Motions for stay

- Motions for stay are not usually considered independent of the merits of an application

- If a stay would reduce the urgency of an appeal and allow more time, it may be ordered
- A motion for stay should be answered at the same time as the application
- The appellant should move for a stay in the trial court first
- It is possible to move to waive the requirement of a transcript of the hearing on the motion for stay
- The court may, but rarely does, order a stay sua sponte

d) Motions for expedited review

- A motion for expedited review will be granted if there is a statutory right to it
- If a party is severely ill or death is imminent, expedited review may be granted
- If the issue would be moot in the absence of expedited review, it would likely be considered
- Examples include elections, evictions, custody changes and payment of judgments
- Isolated instances include forcing a trial court decision and moving settlement negotiations
- Parties should not give the court arbitrary deadlines
- Advise the court of the context, upcoming firm dates, and allow the court to prioritize the case
- Motions for expedited review of issues are best filed on Mondays or Tuesdays
- In the Supreme Court, the time frame is more rigid and even expedited cases may take longer

e) Motions for peremptory reversal:

- Peremptory reversal is rarely granted
- The court is not likely to extract a single issue from an appeal of right to consider it
- Motions for peremptory reversal should be filed separately from applications for leave to appeal
- Both motions for peremptory reversal and applications for leave must be unanimous decisions
- Motions for peremptory reversal are decided within 9-10 weeks of filing of the appellee's brief

- The court will review the motion and decide it on the merits, not on consideration of the timing
- If there is manifest error, the timing is not really relevant, just the error
- Reversal may be granted in criminal or family law cases where it is clear the trial court was wrong

f) Applications for leave to appeal

- Attach whatever part of the lower court record the appellate court will need for review
- Bookmarks in .pdf files are strongly favored

6. Dealing With the Facts and the Record

a) Record presentation

- External hyperlinks in documents may be stripped out and should not be relied upon
- The court is considering an upgrade that would allow external hyperlinks
- Alternatives may include use of Google Drive links
- Currently, video files cannot be uploaded in support of a brief
- File five copies of a CD or USB drive with an e-filed brief
- Include a “viewer” on the CD or USB drive
- Use file names which explain the content

b) Exhibits and evidence

- Use and filing of physical evidence are addressed in the court’s IOPs.
- Attach a copy of the referenced evidence to the brief
- Include the evidence in the appendix if at all possible
- Do not rely on the lower court record to contain it
- Do not count on evidence being readily identifiable in the lower court record
- Physical evidence should be filed with lower court if possible
- Physical evidence can be filed with the Court of Appeals

c) Briefing issues

- The court is considering a change from page limits to word count
- A voluntary pilot project is possible

- A “total word count” (opening brief + reply brief) was proposed
- Electronic briefs need to find a way to accommodate readers using different platforms
- Embedded tables are fine but must comply with font and other briefing requirements
- The court is not yet issuing defect letters for non-compliance with new appendix rules
- The court would entertain a motion to strike a brief for non-compliance with the new rules
- Motions to strike should focus on rules compliance, not use of information outside record

d) Record issues

- In the event of an inaccurate transcript, you may need to move for an order to settle the record
- Attorneys can contact the Court Reporting and Recording Board of Review
- Severe inaccuracy or tardiness are worth reporting
- The appellant may have to file a motion to extend the time on the court reporter’s behalf
- The appellant may have to file a motion to show cause the reporter for a late transcript
- The court may assess costs against the reporter in severe cases
- Such orders are sent to the Board of Review for possible discipline.
- Provide the court reporter with a glossary of technical or medical terms to improve accuracy

e) Presenting the facts

- Chronological order rather than issue order is preferred.
- The facts may focus on testimony which is relevant to specific issues
- Focus on telling the story
- A complicated or uncommon area of law may need a greater explanation of the general area

C. Family

1. The Good, the Bad, and the Ugly of Family Law Appellate Jurisdiction

Background

This session focused on MCR 7.202(6)(a)(iii) and the changes to that rule made effective January 1, 2019. Prior to January 1, 2019, an order was appealable by right in a domestic relations action if it was “a postjudgment order affecting the custody of a minor.” This included changes of domicile, denials of changes of custody, grandparenting time, and parenting time changes that changed the established custodial environment of a child.

Effective January 1, 2019, the new rule focuses on the type of motion filed, rather than whether it “affects custody.” Specifically, the new rule makes “a postjudgment order that, as to a minor, grants or denies a motion to change legal custody, physical custody, or domicile” appealable by right. The new rule has the effect of restricting appellate rights, as it no longer allows appeals of, for example, grandparenting time orders, changes to parenting time that amount to effective changes of custody, or revocation of paternity motions.

Impact of the New Rule

It was noted that the new rule creates more of a bright line rule and is likely meant to create more stability and predictability. Judges expressed concern that allowing all parenting time orders to be appealable by right, for example, would open the floodgates, waste resources, and prolong cases. They further noted that the new rule will prevent people from bringing appeals simply to impose financial hardship on another party.

However, it also takes away a right of appeal that previously existed. Practitioners were largely unhappy with the new rule. One practitioner, for example, countered that a leave denial makes it so a parent being financially abused cannot as easily request attorney fees. Others were very concerned about the fact that many trial courts do not follow the law in family law cases. The new rule was contrasted with appeals by right of attorney fees. All attorney fees are appealable by right, without limitation as exists in the domestic relations subsection. Some questioned whether taking away the right of appeal violated a constitutional right.

One practitioner suggested that a postjudgment motion should be treated like a new case. On appeal, an attorney must only order transcripts from that motion forward, for example, so it is somewhat like a new case. Another practitioner was concerned that applications will take longer to reach the end of the appeal process than an appeal by right, which also means the child’s established custodial environment may change while the appeal is pending. Ordering transcripts, also, can take time, and that can make the filing of a timely application more problematic than the filing of a timely claim of appeal. The discussion shifted at one point to technology and how transcripts could be created more quickly with improved technology.

An appellate judge made clear that the Court of Appeals takes every application for leave to appeal very seriously, and that the Court of Appeals might find the argument that a particular case would have been an appeal by right under the old rule persuasive when determining whether to grant an application. Another appellate judge expressed that it was a mistake that grandparenting time is not appealable by right, and that judge would grant any grandparenting time application because the judge believed it should be appealable by right.

Appellate judges also expressed that there are not enough peremptory reversals in family law cases because trial courts often fail to follow proper procedure. To get around the unanimity required for peremptory reversal, judges suggested using motions to remand when a trial court does not make a finding regarding the child's established custodial environment or the best interest factors. They indicated that several judges support this idea, and a new culture could develop for remanding cases in those situations.

Although they noted some potential benefits of the new rule, judges were largely as stunned as practitioners by the final rule language. One judge suggested that orders that affect the child's established custodial environment should be appealable by right. It was agreed that the family bar needs to discuss it more

2. What's Your Standard (of Review)?

- Recognize the tension or balance between speed and finality vs. accuracy
 - This is especially true in cases involving children. Families are better able to adjust to new structures when they know their custody order is final. However, when the issues concern a child's best interests, it's important to get the right, accurate decision.
- What is the standard of review in custody cases?
 - MCL 722.28 – “all orders and judgments of the circuit court shall be affirmed on appeal unless the trial judge made findings of fact against the great weight of evidence or committed **a palpable abuse of discretion** or a clear legal error on a major issue.” (emphasis added)
 - In *Fletcher v Fletcher*, 447 Mich 871, 886 (1994), the Court clarified the standard of review in custody cases and found that cases are to be reviewed in accordance with MCL 722.28.

This is a high standard to meet and falls on the side of finality.

- Arguments to re-define or re-apply this standard – see attachment 3 in the materials (excerpt from brief, Liisa Speaker).
 - Don't need legislative change just because statute uses “palpable”
 - Legislature used the term because that's what the Supreme Court used in many prior cases
 - Palpable is not that different from abuse of discretion
 - Thus, Supreme Court could find that palpable is same as abuse of discretion
- Findings on best interest factors
 - In practice, trial court findings of fact on the best interest factors are almost always unreviewable because of the appellate court's discretion to trial court's findings of facts.
 - If there is no legal error – if the lower court applied the law correctly in its custody determination – the standard of review of factual findings is very high. It is whether the findings of fact are against the great weight of the evidence.

- Query: Does this create a system where child custody decisions are almost unreviewable?
- Compare the standards of review of a custody determination vs. for an attorney fees award:
 - It's much lower to reverse attorney fees and yet child custody decisions are vitally important and unlike attorney fees concerns fundamental liberty interests.
- Query: Should there be a less deferential standard of review in custody cases?
 - Such decisions are subjective by nature – comparing two parents and their parenting styles – and ripe for subjective judgments.
 - Perhaps there should be three appeals judges re-reviewing one judge's decision and deciding on their own whether the custody determination was in the child's best interests.
- Concerns were raised that some courts use results-oriented reasoning in their decision making. In other words, a court first determines a custody outcome and fits the facts to its preferred outcome.
 - However, this practice is somewhat balanced by requiring a court to do thorough review of all 12 best interest factors.
 - But, the appellate standard of review is so high that it's often affirmed on appeal
 - “Reasonable outcome” – standard for review of attorney fees and other issues
 - “Perversity or bias” – current family law standard
 - Shouldn't review of custody determinations be based on reasonable outcomes? Especially given the subjective nature of custody decisions.
- Constitutional issue whether Legislature even has power to define standard of review; shouldn't that be set by rules of court. Standard rules and procedures, or substance?
 - Any argument standard of review isn't procedural? No.
 - Whether its outcome determinative, which is in favor of finding substantive, but that argument loops onto itself.
 - Standard of review seems like a court decision not legis – so separation of powers issue.
- Possible constitutional issues
 - Who makes decisions? Consider FOC decision makers, arbitrators. They are not judges as required by the constitution, but other third parties permitted to step in for the judge to make decisions.
- FOC referee decisions
 - Is it a palpable abuse of discretion for trial judge to adopt findings of non-judicial officer – the FOC referee. Yet, this is what trial judges often do on a “de novo” review of a referee decision.
 - Why give the trial court more deference than appeals court where trial court is only reviewing the FOC hearing by reading the transcript.
 - Compare to *People v Kavanaugh*.

- There are court of appeals opinions where the court deferred to the trial court's credibility finding when it only relied on review of the same transcript that was before appellate court.
- Does it depend on how close the call is on the evidence? So we've decided to give the trial court first review.
- Special deference to trial court's review of evidence. This is the standard/rule now being applied.
 - *Sparks v Sparks*, 440 Mich 141, 151-152 (1992) – if court of appeals accepts facts, it can make dispositional decisions as well as a trial court.
 - *Sparks* standard – challenge to the trial court's fact findings is reviewed under the “clearly erroneous standard.”
 - Does it come down to the different roles of the courts – appellate vs. trial?
 - That's not what *Sparks* says. It says it is the duty of the appellate court to reach the proper conclusion.
- Odd divergence between standards of review in custody vs property decisions
 - *Fletcher* palpable abuse of discretion is the standard in custody, but perhaps it's more appropriate in property decisions
 - *Sparks* – clearly erroneous is the standard in property, but perhaps it's more appropriate in custody decisions
 - But, some concern that asking for a change could result in stricter review of property decisions. (See the discussion of the final order rule)
 - Then, we're back at the stress between finality v accuracy
- By accuracy we mean in custody cases, a less deferential review of findings of fact and dispositional decision. Especially in custody decisions where the appellate court agrees with a fact or facts, but issue is how that fact is used/applied to a best interest factor.
- Resolution?
 - Use the “clearly erroneous” standard set out in *Sparks* for review of custody decisions.
 - Applying law to facts – that task recognizes the role of the appellate court.
 - Perversity of will/bias—that's the standard by statute that applies to custody.
 - We could also look at standard in *Moldonado v Ford Motor Co*, 476 Mich 372, 388 (2006) – abuse of discretion. That would also be a better standard in custody decisions.
 - It's a less deferential standard
 - Emphasis is on independence of appellate review
- However, there is a strong policy argument for finality:
 - It's still possible to have 10 different views among appellate judges, which means finality is harder to reach

- Another resolution:
 - Most custody cases turn on how facts apply to the best interest factors, not so much what the facts are. It’s application of law to facts. For example, factor c favors father is not a factual finding; it’s application of the law to the fact.
 - These decisions should use a less strict standard – maybe de novo review.
- Perhaps the trial and appellate courts can message each other on these issues-
 - COA often on remand tells trial court what to focus on; what law to apply.
 - We encourage trial courts to do the same. For example, on standard of review, if the trial court states “if the standard is clear/convincing, this is the evidence that I find meets that standard.” That gives the court of appeals a message about how to review the court’s decision.
- Standard of review of custody cases would be helped by trial courts focusing on following the step by step processes set out in cases, rules, statutes.
 - Example: change of custody/domicile. Flow charts set out in cases including *Rains v Raines*.
- Conclusion
 - It’s hard to seek review of a custody decision when review/appeal is only based on findings under best interest factors without any process or legal error.
 - Although, some practitioners have had success on factual findings where the trial court makes very odd findings on the best interest factors.

D. Child Welfare

1. Show Me the Money!

- The first topic discussed what is a reasonable fee?

The moderator asked those in attendance about the appellate fee structure in their county or any county they had knowledge of. The following information was offered in response. It was generally agreed that the court-appointed pay for child welfare appeals is extremely poor.

<u>County</u>	<u>Hourly Rate</u>	<u>Fee cap: yes or no?</u>
Ingham	\$30/hr. for brief \$45/hr. in court	\$750
Shiawassee	\$60/hr.	\$1,000
Chippewa	\$50/hr.	No
Ontonagon	\$50/hr.	No
Livingston	\$60/hr.	\$1,000

Jackson	\$50/hr.	\$750
Berrien	\$50/hr.	\$1,000
<u>County</u>	<u>Hourly Rate</u>	<u>Fee cap: yes or no?</u>
Calhoun	\$35/hr.	\$1,000
Macomb	Counsel may choose – to a point. The highest hourly fee requested by the attendee who provided this information was \$50/hr.	No
Wayne		\$250 – no brief filed \$750 – stip to dismiss and withdraw brief; no oral argument \$1,000
Kent	\$53/hr.	Varies by judge
Clinton	\$60/hr.	\$1,200
Oakland*	\$60/hr.	\$1,000
Leelanau	\$60/hr.	\$1,000

* One Oakland county attorney had prepared a Supreme Court application and was not paid for a second brief submitted to the Court. Notes are unclear whether the attorney was paid for the initial application however anecdotal information known to the reporter is that court-appointed attorneys have to file fee requests to be paid for any Supreme Court services.

- The moderator asked about motions for extra fees and received the following responses:
 - An Oakland County attorney had successfully done so, receiving \$800.
 - An Oakland County attorney had unsuccessfully petitioned.
 - Livingston County attorney had successfully done so, receiving \$800.
 - A Wayne County attorney had successfully done so, receiving approximately \$750.

- An Ingham County attorney had successfully done so, receiving \$400.
- One attendee noted that there were criminal defense attorneys who have been appealing the denial of fees in the trial court with mixed results.
- A recent unpublished Court of Appeals opinion was noted, docket number 334309, *In re Attorney Fees of Mitchell Foster*. It noted the denial of extra fees was affirmed with a dissent that examined the question of reasonable fees.
- Reporter's Note: The Michigan Supreme partially reversed the Court of Appeals decision in *Foster* in an Order dated March 20, 2019. The Supreme Court docket number is 157509. This Order was issued just one week before the conference.
- One attendee noted that many who do child welfare work simply don't have the time to pursue fees endlessly. Another noted that it might not be worth the time if you're only going to get extra couple hundred dollars.
- One attendee noted there have been cases at the Michigan Supreme Court noting a 1993 case *In re Recorders Court Bar Ass'n*, 443 Mich 110 (1993).
- Another person cited a report titled "Race to the Bottom."
- Another attendee noted that the indigent defense commission has been trying to set standards. Another wondered if the legislature was going to begin funding standing defense offices in Michigan counties. It appears there is been some conversation about that but one concern raised was would such a system become the equivalent of an "old boys network."
- One attendee's suggested that perhaps attorneys need to start with the parents' constitutional right to care and custody of children as the reason why appellate attorney fees are so important.
- Another attendee noted that there are cases allowing funding for expert testimony for criminal defendants but very little on the topic in the child welfare context.
- Another attendee noted there is a fiscal angle to the situation and what is the cost of foster care versus the cost of later criminal actions by the child and the cost of simply paying an attorney to keep children with their parents. Another attendee wondered if you could "sell" the issue by focusing on the LGAL's role and how they are paid which is generally similar to the parent, rather than focusing on the parents. Another load noted that since most decisions are local you may need to start locally.
- One attendee noted that Oakland County included court-appointed attorneys generally in cost-of-living increases however that did not change appellate fees.

- There was a discussion about the pilot project run by the Appellate Defender Commission, that being Michigan Appellate Assigned Counsel System (MAACS). That system is addressing appointed attorneys in criminal appeals. Their fee structure is they pay \$50 an hour with a \$750 For a plea-based appeal, and \$75 an hour with a 45-hour max “plus expenses” for other appeals. The initial feedback for that program seemed positive.
- One attendee wondered if section 4E funding could be used as a funding resource for parents’ attorney in child welfare cases. Another wondered if child welfare cases could be incorporated into the MAACS system. It was thought if this could be done it may have to be done from scratch.
- One attendee mentioned the case concerning the Wayne County criminal defense bar saying that in that case, the court ruled on MCL 775.16, not on constitutional issues and that perhaps the language of that case would be useful.
- Another approach to address the issue would be a federal lawsuit, based on the parents’ rights. That could potentially take the issue out of the political realm. But again that would be time-consuming as well.
- Another attendee asked why isn’t the family law section of the State Bar more involved in this issue? Another wondered what about talking to the State Bar president, would that possibly help anything?
- One attendee noted that the children’s law section now has a committee to look at fees but did not have any further information about the committee.

2. Keeping Up with The Joneses (Cases You Should Know)

University of Michigan Professor, Joshua Kay discussed the top 20 cases you ought to know working at the appellate or trial level in the area of child welfare law. Some cases are older, some are quite new. You may disagree with his selections for his top 20; that’s ok; his list is not exhaustive, but the cases cover key subject areas.

He believes that people don’t use and cite the law enough. He encourages us to use the tools we have as lawyers to improve these issues.

In re Sanders (individual adjudication required)

495 Mich 394; 852 NW2d 524 (2014)

This ended the one parent doctrine, citing *In re CR* (but he notes that the one parent doctrine had predated *CR*; it had been used for about 70 years).

Holding: each person gets his own adjudication. It’s that simple.

A parent cannot be ordered to participate in services without being adjudicated. Just because one parent is adjudicated, you can’t use that fact to order the other parent to participate

in services. (The non-adjudicated parent could theoretically agree to participate in services; just cannot be ordered to do so without adjudication).

Based on *Stanley v IL*, 405 U.S. 645 (1972) – JK notes it only took Michigan 40 years to come around to use the U.S. Supreme Court case law.

Parent made a motion to place the child with his mother and that's where this appeal came from; that motion catalyzed this particular case.

This decision notes that a parent's right to direct the care, custody, and control of his or her child free from state interference is a core liberty interest protected by the 14th Amendment. The case cites numerous cases:

- *Stanley v. Illinois*, 405 U.S. 645 (1972)
- *Smith v. OFFER*, 431 U.S. 816 (1977)
- *Santosky v. Kramer*, 455 U.S. 745 (1982)
- *Troxel v. Granville*, 530 U.S. 57 (2000)
- *In re Brock*, 442 Mich. 101 (1993)
- *In re JK*, 468 Mich. 202 (2003)

This right had already been recognized in Michigan since at least 1993; that parents have a liberty interest in raising their children protected by the 14th amendment.

In re DEARMON (evidence at adjudication)

303 Mich App 684; 847 NW2d 514 (2014)

This case has a holding that we all need to be mindful of: evidence obtained after the petition is filed can be used. As long as respondent has notice that it's going to be used.

He used to hear when he did trials that evidence would only include what was the evidence up to the time of the petition filing. But that's not accurate. Evidence obtained after a petition has been filed may be presented at adjudication if relevant to allegations in petition and respondent has notice of evidence.

FACTS: The petitioner said respondent had not extricated herself from an abusive relationship. Respondent said yes, I have. There were audiotapes from jailhouse telephone that contradicted what respondent said; this evidence was admitted as evidence of her intent to maintain relationship with the abusive partner.

In RE BROCK (cross examination and privilege)

442 Mich 101; 499 NW2d 752 (1993)

These child protective proceedings are not criminal matters; the 6th amendment does not apply; there is no right to confront. Alternative questioning methods can be used, such as impartial examiner and video depositions.

The issue is that if the goal is to get at the truth and then you traumatize the witness, you are less likely to get at the truth.

See MCL 722.631, abrogation of most privileges, other than attorney-client and priest-penitent.

In re JACOBS (culpability)

433 Mich 24; 444 NW2d 789 (1989)

You don't have to have culpability to have neglect. MCL 712A.2(b)1 and 2(b)2 COA looked at very carefully.

2(b)1 was interpreted as a culpability requirement; this section uses "neglect" as a verb.

2(b)2 uses "neglect" as a noun and includes no culpability.

In re ROOD (notice and reasonable efforts)

483 Mich 73; 763 NW2d 587 (2009)

The Court discussed the constitutionally protected liberty interest of parents in the care, custody, and management of their children.

The Michigan Supreme Court cited *Reist v Bay Co. Circuit Judge*, 396 Mich 326 (1976), which notes that children share fundamental rights to mutual support and society – a rare statement of children's constitutional rights.

Held: the parent's right to notice and to be heard was violated in this case by notice errors of the agency and the lower court.

Held: the parents must have notice of proceedings, an opportunity to be heard, and an opportunity to participate in the case, including services. The Court stressed the importance of the reasonable efforts requirement; that reasonable efforts must be made unless there are aggravated circumstances.

In re MASON (incarcerated parents and reasonable efforts)

486 Mich 142; 782 NW2d 747 (2010)

This case is kind of like *Rood*, but for incarcerated parents.

Held: Reasonable efforts are required unless there are aggravated circumstances (reiterating this statement from *Rood* a year before).

This case changed the understanding of MCL 712A.19b(3)(h) re incarcerated parents. It used to be that if the parent would be incarcerated for 2 years (the child deprived of a home for that period), that was it. This decision brought life back to the actually three conditions under the statute, *ie*, that there was likelihood of more than 2 years in prison, that criminal history alone

does not justify termination of parental rights (TPR), and that the court must consider placement with relative as part of its best interest determination.

MCL 712A.19a: the Court drew on this section which has to do with when the trial court has to tell the agency to file to TPR; and the Court basically imported part of this into the best interests of the child determination in a TPR case.

Mason put into the main opinion which *Rood* just had in a concurring opinion: that failure to make reasonable efforts creates a hole in the evidence rendering TPR premature.

Questions were raised concerning writing someone out from jail. Under *Vasquez*, there's a balancing test to bring someone over to the court for an in-person hearing.

Participant mentions the *Render* case: the respondent mother was in the county jail and was not brought to court to be present for the dispositional hearing. The Court of Appeals remanded to the probate court for further proceedings.¹ *In re Render*, 145 Mich App 344; 377 N.W.2d 421 (1985).

Participant comment: *In re Hamlet* – judge refused to writ the father out of the county jail in a different county, and that was reversed and remanded.²

JK's view is that if it's doable, yes, they should get the parent into the court.

Use the *Mathews v Eldridge* balancing test.

Participant comment: attorney sees a lot of cases coming back when placement with a relative was not considered. JK agreed, observing that there have been dozens of reversals on this factor from *Mason*.

Participant comment: she raises this issue as the LGAL. JK responded that he does the same thing.

¹ The Court of Appeals defined the issue as: "The issue I whether due process required the probate court to make an affirmative effort to secure respondent's presence. On the facts of this case, we believe it did." *Render*, 145 Mich App 347-348. In remanding the case, the Court did not order a "completely new dispositional hearing," however, which it noted "would be excessive, given the nature of the constitutional violation. Rather, on remand, the probate court must arrange for respondent's presence and give her an opportunity to present evidence concerning her fitness and efforts, if any, to provide a fit home for the child. Cf., *In the Matter of Taurus F*, 415 Mich. 512; 330 NW2d 33 (1982)." *Render*, 145 Mich App 350.

² *In re Hamlet (After Remand)*, 225 Mich. App. 505, 521; 571 N.W.2d 750 (1997): respondent father was being held in Oakland County Jail at the time of the termination of parental rights hearing, thus Court of Appeals "reversed the probate court's decision to terminate, on the basis that the probate court committed error requiring reversal by not securing respondent's physical presence at the termination hearing as required by due process." *In re Hamlet*, unpublished opinion per curiam of the Court of Appeals, issued July 23, 1993 (Docket Nos. 148996, 150137).

In re HRC (in camera interviews of children and reasonable efforts limit)

286 Mich App 444; 781 NW2d 105 (2009)

You cannot hold child interviews off the record in child protective proceedings (in child custody cases, yes, but not in CPPs). That was the main holding of *HRC*, but there's another one, which is: If the agency's goal is TPR, the agency does not need to make reasonable efforts; the agency can do so, but does not have to.

But JK notes that that part of the holding conflicts with unequivocal decisions from both *Rood* and *Mason*, which both held that RE *are required unless* there are aggravated circumstances. See lists of aggravated circumstances in: MCL 722.638, MCL 712A.19a(2)(a), (b), and MCL 712A.19b(3)(k), (l).

So that puts this decision in conflict with *Rood* and *Mason*, which were clear and unequivocal.

JK notes that the statement of "if TPR is the goal, no reasonable efforts are necessary" is dicta only. But the COA has followed this part of the Court's ruling.

Participant comment: re no RE findings could conflict with or jeopardize Title IV-E funding. JK agrees. That could be another ground for appealing these decisions.

Participant comment: attorney sees this holding used in APPLA and juvenile GM cases. JK agrees.

Rhetorical question raised: attorney not sure what would happen/should happen when a parent is not participating in the agency plan, not doing services and the kids have been in care a long time – would that be a case where TPR is justified without additional RE?

In re NEWMAN (re opportunity to rectify)

189 Mich App 61; 472 NW2d 38 (1991)

Agency must give respondents a full and fair opportunity to address identified problems.

Homemaker showed up with cleaning supplies, looked at dirty house, dropped supplies and left. This was not sufficient opportunity to rectify conditions.

Attorney comment: the other thing she likes about *Newman* is that the parents never had the chance to show their ability to parent the other children without the problem child being present.

In re JK (treatment compliance and adoption)

468 Mich 202; 661 NW2d 216 (2003)

Compliance with treatment plan is evidence of ability to provide proper care and custody.

Can't compare foster homes and parental homes when deciding statutory grounds – you can at the best interest stage, but not at the statutory grounds stage.

Also, no adoption can be ordered if TPR appeal is pending.

In re Gazella 2005 clarified that it's not just compliance that must be demonstrated, but also showing benefit from services.

In re Hicks/Brown (disability)
893 NW2d 637 (Mich, 2017)

Agency is bound by title II of the ADA, so are the agency's contract agencies.

If the agency is aware or ought to be aware of the disability, it must accommodate that disability.

There is an affirmative duty on the court and the agency to follow the ADA in these cases.

“Ought to know”: some disabilities are obvious/visible. In this case, there were reports issued that made clear that the mother had disabilities.

Previous case from 2000: *In re Terry* – re ADA also. It had strict timeliness rule. Disability not raised until closing argument of the TPR case. That was way too late. You have to request accommodations at initial disposition or very soon thereafter.

Hicks/Brown did not overrule *Terry*, but qualified it; Court dismissed the old rule re timeliness of request for accommodations as dicta.

The new rule seems to be that as long as there is time for accommodations to be implemented, then they need to be made.

In re JL (active efforts under ICWA)
483 Mich 300; 770 NW2d 853 (2009)

The discussion re active efforts is extendable to the RE requirement. That is, if recent/relevant active efforts were made that failed, the agency does not need to offer services again.

Active efforts under the Indian Child Welfare Act (ICWA) involve affirmative steps, active involvement of agency workers in implementation rather than merely giving a list of services.

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

In re MORRIS (ICWA notice and remedy)

491 Mich 81; 815 NW2d 62 (2012)

This case presents a very clear recitation of steps to follow for ICWA compliance.

In re MOSS (best interests, standard of proof)

301 Mich App 76; 836 NW2d 182 (2013)

Before this case, you would not get clear answer as to what's the standard of proof for the best interests stage. The Court said it's a preponderance standard, not clear and convincing evidence.

The reason is that at best interests stage, parental unfitness has been proven, and child's interest in safety aligns with the state's interest. There is no need for heightened standard of proof at this stage. If heightened standard of proof were to be used at this stage, then an error is more likely to keep child with unfit parent. The focus at best interests stage is on the child, not the parent.

In re WHITE (BIC findings)

303 Mich App 701; 846 NW2d 61 (2014)

In re Olive/Metts held that each child requires an individual best interest of the child (BIC) analysis at TPR stage, but *White* clarifies that you don't have to be redundant. If the kids are same/similar, make that clear and no need to do repetitive findings.

For BIC determination, the court should consider parent-child bond, parenting ability, child's need for permanency, stability, and finality, advantages of foster home, domestic violence history, compliance with service plan, etc. In other words, the Court of Appeals here set forth a helpful list of items the trial court could/should consider for BIC determination.

In re A.P. – child custody and child welfare cases overlap.

283 Mich. App. 574, 770 N.W.2d 403 (2009).

This is a how-to case; the existing child custody order goes dormant during a juvenile proceeding. The child custody order is effective again when the juvenile case is dismissed.

Juvenile court orders supersede custody orders; they don't modify or terminate them.

Using the existing child custody order could be a way to effectively keep the child safe while trying to close out the juvenile case.

This case talks about children's liberty interests: child has due process liberty interest in family life. Child has a right to proper and necessary support, education, and care; to a fit parent.

Q: Is there any case that deals with child support while ongoing juvenile case? JK says yes, see *In re Beck*, a Michigan Supreme Court case – *Beck* talks about parent's rights and obligations, and notes that TPR does not automatically end a parent's child support obligation.

In re M.U. (Unger) (criminality under MCL 712A.2(b)(2) does not require conviction)

264 Mich App 270; 690 NW2d 495 (2005)

In re BLAKEMAN (self-incrimination)

COA Docket Number 341826 (2018) (no reporter # yet).

Father denied the harm alleged. The trial court conditioned return to home on father admitting responsibility.

The Court of Appeals said you cannot do that, that's a violation of his 5th amendment rights. You cannot hinge reunification on an admission of guilt.

In re LAFRANCE (anticipatory neglect)

306 Mich App 713; 858 NW2d 143 (2014)

JK notes that the *Matter of LaFlure* case mentioned anticipatory neglect as well, but in *LaFlure* the anticipatory neglect portion of the decision is just two sentences at the end of the 1970's case.³ JK says that *LaFrance* does a better job explaining the doctrine of anticipatory neglect.

Jurisdiction based on father's failure to recognize infant's serious illness and get treatment. Court ordered TPR as to infant and other kids.

The Court of Appeals said no: you need to show risk of harm more directly; when kids are so dissimilar, circumstances are so different, the father's treatment of the infant is not probative of his treatment of the other kids (the other children were much older than the infant).

In re K.H. (putative fathers).

469 Mich 621; 677 NW2d 800 (2004)

Putative fathers cannot be respondents in child protective proceedings – unless he meets definition of a “non parent adult.” Legal paternity must be established first.

A putative father does not meet definition of parent and father as defined in MCR 3.903(A).

Also, the definition of respondent does not encompass putative fathers – see MCR 3.903(C) and MCR 3.977(B).

Per JK: trial courts could follow MCR 3.921(D) and things would be more efficient and proper.

In re YARBROUGH (funding for experts)

³ *In the Matter of LaFlure*, 48 Mich App 377; 210 N.W.2d 482 (1973).

314 Mich App 111; 885 NW2d 878 (2016)

This is the case that stands for the proposition that a parent is entitled to expert witness funds. But, note: If an expert is not going to be of meaningful assistance, then an expert should not be used anyway. *Yarbrough* does not stand for the proposition that all you have to do as a parent is request an expert and you get one.

In this case, the parents requested funds for an expert to clarify the conflict between two groups of experts from different hospitals. There were two groups of experts with dueling opinions. The agency went with the expert that held trauma had caused infant's injuries, rather than the other expert.

The Court of Appeals followed carefully the *Mathews v Eldridge* test.

This case involved conflicts between doctors about complex medical evidence. That will not always be the case.

Q: Curious about the statutory language re proper care and custody, subsection (g) [MCL 712A.19b(3)(g)]: how is it affecting trial practice? JK says it's already affecting practice where he practices.

This is a poverty section. Poverty won't be held against them; it won't be a basis for TPR. Some trial courts have held it won't view poverty under ground "g". Poverty exception has been recognized in other places, like New York. Agencies find ways around poverty exemption in NY, JK says, but he does not want to sound cynical. JK says if TPR is really needed, there are probably going to be grounds additional to mere poverty anyway.

Q: What about the possible retroactivity of *Sanders*? JK said nothing at this point.

Q: Failure to request an expert would be ineffective assistance of counsel? JK says yes.

Q: You mentioned *Reist* and how the child's constitutional rights so rarely stated; why is that? JK doesn't know, but says that SCOTUS does not articulate it that way, which is why it's so exciting to have this stated in *Reist*.

E. Michigan Supreme Court Mini-Oral Arguments (MOAs) - How Are They Working?

This session was prompted in part by the Michigan Supreme Court's Order inviting comment on whether MOAAs should be formalized, how they should be handled, and whether they are working.

1. History of MOAAs

- In the 1970s, there were approximately 70-80 opinions issued per term on argued cases, with about 10 issues in memorandum, per curiam, or other format.

- In 2003, the MOAA procedure was introduced and allowed 4 justices to take action in spite of internal rule without full grant of leave – allowed 4-3 action with limited oral argument and supplemental briefs on application.
- They were intended for cases where a four-vote majority thought it should grant some sort of peremptory relief, but did not have the five votes necessary for peremptory relief.
- There was a period where the Court would issue 4-3 opinions on letter requests by prisoners, which prompted complaints from prosecutors and a switch to the requirement for five votes in order to take peremptory action.
- There was a perceived benefit to shorter oral arguments on supplemental briefs rather than a full grant of leave.
- However, MOAAs are now not used for that limited purpose—they have come to dominate the Court’s docket.

2. MOAA trends

- In the current term, there have been 40 MOAAs ordered and only 6 leave granted cases.
- Handouts show the list of cases where leave was granted versus MOAAs from 2004 (77 leave granted, 23 MOAA) to the present (17 leave granted, 53 MOAA)
- Most of the assembled practitioners had argued a MOAA, and far fewer had argued a case on leave granted.

3. Application practice in light of MOAAs

- If filing an application for leave to appeal, what approach do you take in light of the difference between MOAA and leave granted? Win on the merits or show the Court why the case is important (and warrants a grant of leave)?
 - Most do both—show the Court why this issue is important, and then why you should win.
 - Some are more conclusory on the merits as compared to their Court of Appeals briefing. The notion is that if you get past the application stage, you can set forth more specifics in your supplemental or leave granted brief.
 - When an application is filed, there is the Court of Appeals decision to address as well as the jurisprudential significance.
 - One practitioner took a suggestion from a justice to state in the application when he believes MOAA is appropriate, and that’s worked for him.

4. Practitioner approaches to supplemental briefs on MOAA

- General consensus that it is wise to treat a MOAA like a leave grant and file a substantive brief, because as some individuals point out, it is difficult to suss out any rhyme or reason why/ when leave may be ultimately granted after MOAA procedure.
- When filing a supplemental brief, there’s an opportunity to develop areas of interest that have been specifically identified by the Court.

- Some see it as two bites at the apple to get an issue before the Court, which has both the supplemental brief and the application brief.
- Some wonder whether the supplemental briefing process means that the Court is not interested in the other issues.
- Tell the Court what the effect of its decision will be on the state's jurisprudence.
- Some repetition of application materials may be necessary, although several practitioners simply refer back to the application brief rather than repeat what's already been said, particularly as to facts and to issues that are not raised in the order granting supplemental briefs.
- Recommendations include shorter recitation of ancillary issues that were contained in application, making sure the supplemental brief has its own character, adding more case law and more support from outside jurisdictions.
- Even though clients sometimes don't want to spend extra money to redo application briefs for purposes of MOAA, there is a risk in not filing a supplemental brief—don't want arguments about importance of case to be confused with arguments on merits of issue.
- No one has stated in a supplemental brief that there's really nothing more to say on the issue.
- As a MOAA appellee, you should be telling the Court what you want it to do, not necessary just asking it not to grant leave. One participant discouraged appellees from asking the Court to grant leave.
- Recommended that appellees go back to facts in record, and show the Court why the case isn't a good vehicle to address the issue.
- SADO treats MOAA briefs as standalone briefs like on leave granted, where an application more closely resembles a Court of Appeals brief supplemented with analysis of the Court of Appeals opinion.
- Should work significance of issue into argument subheading.
- Some practitioners have invited amicus support on a MOAA.
- If the MOAA order asks for briefing on certain issues, should you also include other issues in your supplemental brief?
 - There is a split in the room as to whether this should be done
 - Should first address ordered issues, then potentially touch on other issues that were important (and wrong) in the COA
 - Should potentially do it where the issue is crucial, and ties into other issues that are teed up in the MOAA order
 - One practitioner noted that when a non-invited issue was discussed, it prompted questions at MOAA from the panel
 - It is important to remember that the Court is considering both the application and the supplemental brief on MOAA
 - Parties should factor information from the MOAA order into their recalibration of briefing and oral argument preparation

5. MOAA arguments

- When MOAA is granted, there's a sense that this is "the show," because the likelihood of a subsequent grant of leave is low.
- The strategy must be to win on a MOAA, because the Court commonly denies further review, or issues a full opinion on the merits.
- The sense is that if MOAA has been granted, questions from the panel usually aren't about whether the Court should grant leave—it's what the outcome should be.
- Some practitioners have experienced justices asking them about issues not identified in the order granting MOAA.
- In argument, can raise issues that were raised in application but not discussed in supplemental brief.
- If you want Court to grant leave, tell them about something that requires more review than MOAA can provide.
- Difficult to address both merits and significance in half the time given for a leave granted argument.
- Practitioners think MOAA should be given full argument since they're being used more.

6. Court views on MOAA

- Most members of the Court were not there in 2003 when MOAA was adopted—history doesn't mean anything.
- Originally thought of as a way to learn about the case, with the option to deny leave if we take a closer look.
- This justice looks at both supplemental briefs and applications, but that may not be true for all other justices. Both briefs are important because sometimes the application will address issues that aren't discussed in the supplemental brief.
- MOAA gives Court flexibility—can deny leave, rather than rule that leave was improvidently granted or do an opinion on a bad record.
- It might be time to move on to something different. There is a concern that the MOAA allows the Court to potentially more easily duck writing a difficult and contested majority opinion on an important issue – plays to human impulse to avoid hard outcomes.
- In revisiting MOAA, want to take the best parts of leave granted and MOAA processes.
- There are probably better ways to do the work that's being done in the MOAA process.
- Court could ask for supplemental briefing on the issue it might grant on when application is filed, and then just either grant leave or deny.
- Court is hearing a lot of cases in rapid-fire MOAA arguments, and some have important sub-issues.
- At the last Bench Bar conference, one justice thought that MOAAs were best used in cases with clear issues of statutory construction, where full merits briefs are not helpful

7. Suggestions and comments in response to request for comment on MOAA process

- Putting parties through the work and expense of briefing and oral argument only to deny leave is a waste of time, not to mention the use of the Court's resources.
- If a MOAA is granted, it can be unclear whether the Court is struggling with whether to take the case, or is simply interested in economizing argument time while still addressing the merits.
 - It is thus unclear whether oral argument and supplemental brief should even focus on jurisprudential significance, or on the merits, or both, in a given case.
 - This can be unfair to advocates who do not really know how to prepare and cannot read the Court's mind following a MOAA grant.
- It can be difficult to explain to a client the additional expenditure of judicial resources only to then get a denial of leave following a MOAA.
- Some would be happy for MOAA as an appellant, because you get an opportunity to present additional argument and facts rather than an outright rejection.
- Supplemental briefs and the MOAA process can be useful in applications with complex facts where you're up against the page limit and there are other issues you want to address, including more explanation of why leave should be granted.
- Most want to see argument time expanded for MOAA.
- Suggestion of merging MOAA process with leave granted process.
- Some think the system doesn't work as intended for a safeguard against clear error.
- There are too many MOAAs where the Court has issued an unsatisfactory opinion. If the record is inadequate, the Court should ask for an answer while the grant of leave is being decided.
- The number of opinions issued each year is way down because of more MOAAs being granted.
- SADO and other criminal practitioners believe MOAAs are important for criminal law, because the Court of Appeals doesn't consider criminal cases as closely. SADO has a greater presence in the Supreme Court because of MOAAs. However, the need to review Court of Appeals opinions in criminal cases could also be addressed through granting leave more often. Other points raised by SADO in favor of MOAAs:
 - Usually acting on behalf of appellant, and in the past usually had blanket denials
 - MOAA gives more clients their day in court, and some get better results
 - MOAA leads to better outcomes in certain cases vs. straight leave denials
 - The perception among criminal practitioners is that a greater number of cases have recently been addressed as a result of MOAA practice
 - Peremptory orders used to be frustrating – the MOAA process largely fixes this

- An informal poll was taken by show of hands regarding how the MOAA process should proceed in the future
 - Most criminal practitioners in favor of keeping or expanding MOAAs; most civil practitioners would like to see a reduction in use
 - As a general matter, most criminal practitioners were in favor of MOAAs generally, and most civil practitioners dislike the procedure

V. Plenary – Thinking Outside the Box: What’s Working and What Might Be Improved in Our Appellate Courts

MICHIGAN APPELLATE BENCH BAR CONFERENCE

March 28, 2019

3:52 p.m.

The Inn at St. John's Conference Center
44045 5 Mile Road Plymouth, Michigan 48170

THINKING OUTSIDE THE BOX:

What's Working and What Might be Improved in our
Appellate Courts

MODERATORS:

Mr. Matthew Nelson
Ms. Joanne Swanson

FIRST SET OF PANELISTS:

Justice Richard Bernstein
Judge Elizabeth Gleicher
Judge Amy Ronayne Krause
Justice Stephen Markman
Judge Thomas Cameron
Mr. Larry Royster

SECOND SET OF PANELISTS:

Justice Richard Bernstein
Judge Elizabeth Gleicher

Judge Cynthia Stephens
Judge Mark Boonstra
Judge Anica Leticia
Mr. Larry Royster

REPORTED BY:

Ms. Leah M. Witt, CSR-8825
Certified Shorthand Reporter
(248)644-8888

MS. SWANSON: Good afternoon, everyone. My name is Joanne Geha Swanson. My co-moderator, Matt Nelson, and I are pleased to welcome you to the afternoon plenary, Thinking Outside the Box, what's working and what might be improved in our appellate courts.

We have a very distinguished panel of jurists who have graciously agreed to join our discussion this afternoon. They are Supreme Court Justice Stephen Markman, Supreme Court Justice Richard Bernstein, Court of Appeals Judge Thomas Cameron, Court of Appeals Judge Elizabeth Gleicher, Court of Appeals Judge Amy Ronayne Krause, and Supreme Court Clerk Larry Royster. Thank you all for being here today.

(Applause)

MS. SWANSON: As the title suggests, this is a brainstorming session. Our goal is to facilitate a respectful but thought-provoking exchange of ideas and

information relating to the process of decision-making in our appellate courts. We would like you to participate as well. Mary Massaron will be walking around, and please give her any questions that you have that you would like to direct to the panel members.

So without further ado, I would like to introduce Matt Nelson to begin our discussion.

MR. NELSON: Good afternoon. I have to push that up a little bit. Can you hear me? So good afternoon. We have split this panel. You'll see it's listed in the materials as being a two-hour panel.

It's actually a 50-minute panel, followed by a 10-minute intermission for you all to refill your coffee and water, and then we'll have another roughly

50 minutes after that, so this is not the endurance marathon that it might look like.

So we titled the first session here -- we have three topics for the first session, interlocutory appeals, published decisions from the Court of Appeals, and Michigan Supreme Court decisions. And somewhat tongue in cheek, we subtitled this "We like them, we love them, and we want some more of them."

So starting with interlocutory appeals, one aspect of the Michigan appellate practice that is somewhat unusual is the ease by which parties can obtain

interlocutory review in the Michigan Court of Appeals, but there are very few interlocutory appeals by right, orders denying governmental immunity, denying arbitration, and a few others.

This first session, which we're hoping is going to last about 25 minutes, we'll discuss what the courts look for in determining whether to accept a case for interlocutory review and whether there ought to be classes of orders that are treated in such a way that they're more likely to obtain interlocutory review, either on a formal matter or an informal matter.

And I think I'm going to start out with Judge Gleicher and ask, what do you look for in a successful application for leave to appeal?

JUDGE GLEICHER: I look for a closed question that is likely to be if not dispositive ultimately if a trial happens, but it's also likely to set the table for the trial in a way that might unbalance what otherwise would be a fair trial.

So, you know, to me if there's a legal question presented that maybe could go either way but also has the potential to really make it difficult for one side to get a fully fair trial as that side would view it, then I grant -- I vote to grant. I think I'm very -- probably one of the more liberal granters in that sense.

On the other hand, if it's something that really can be fixed or reviewed later without penalizing either party or without making it difficult for both parties to get a fair trial, then let it happen later.

MR. NELSON: Judge Ronayne Krause, anything to add to that?

JUDGE RONAYNE KRAUSE: Absolutely not. My colleague, Judge Gleicher, I was going to add the last part that you just added, so I think she covered it perfectly. That's exactly what we look for.

MR. NELSON: And would you also characterize yourself as a rather liberal granter of applications?

JUDGE RONAYNE KRAUSE: I don't know if I'm a liberal granter of applications, but I will say that if I think an application should be granted or not and I don't agree with the other two, I learned from one of my colleagues -- who I won't name, but she's sitting next to me -- I write -- and I can say this for Larry Royster too -- what I do is I write a short dissent, sometimes longer dissent, so that it may be a commissioner upstairs might see it and bring it to the attention of the justices. That's always my plan if I disagree with my other colleagues.

MR. NELSON: And Judge Cameron?

JUDGE CAMERON: I guess the only thing I would add is, in addition to the close calls, I think on an application if I see something where it appears to me, based on what I have, that there was error but I don't feel comfortable for a preemptory reversal, that I feel as though the record needs to be -- I feel like there may be more to the story that hasn't been developed, then that's another situation where I'm going to be more likely to grant an application. So close calls and something short of a preemptory reversal.

MR. NELSON: So the standard that's set forth in the court rules is just facts showing how the appellant would suffer substantial harm by awaiting judgment -- final judgment before taking an appeal.

What types of -- and that's -- for those of you who are taking notes, that's found in MCR 7.205(B)(1). What types of substantial harm arguments are persuasive, Judge Ronayne Krause?

JUDGE RONAYNE KRAUSE: Well, I mean, I think a substantial harm argument sometimes can be that the decision was absolutely contrary to law, that the argument is that it's absolutely contrary to law, and if there is a trial, it's going to end up taking a whole bunch more time than is needed when, in fact, the answer

can be given right now, that this was wrong and we need to move forward.

So, I mean, specific areas would be, for example, let's say the judge actually ruled incorrectly from the bench, and you read it and you say, oh, you know, the judge didn't think the person was in handcuffs and they were because everybody agrees that they were in the application. Well, that's an issue that needs to be decided then or -- because it could certainly make a difference about whether or not Miranda needed to be read.

So that is the kind of thing that I would say is dealing with the substantial harm because some evidence is going to come in that is going to be prejudicial to the defendant and, therefore, if we don't take care of it now, the trial's going to go forward and just more time will pass and you don't know if the person's in custody or not. So I think criminal applications there can be -- substantial harm is that someone's waiting for you.

MR. NELSON: And, Judge Cameron, the same question, but more towards the civil aspect. I mean, I think probably the most frequent substantial harm that's cited is we're all going to have to incur the expense of a trial that's unnecessary. How persuasive is that and

what other types of justifications are perhaps more persuasive?

JUDGE CAMERON: For me, not very. I guess in a civil context I would think about what we heard from the solicitor general at lunch. He gave an example about that one of the cases that the U.S. Supreme Court is looking at is whether -- the constitutionality of the census and the checking the box on the immigration issue and that the court really needed to do that because they were printing the census, they were being circulated, it had to be done.

I guess in the local context you could apply that to, say, an election case whether there's a question about whether someone can or can't be on the ballot, and you really need to -- the court needs to take that issue because it will be moot if you wait too long. So that would be, in my mind, probably the clearest example of where you would want and need to take a preemptory review in a civil case, because if you don't, the issue becomes moot.

And I guess taking that a little bit further, there is something that there is both error, or that it appears to be error, and also substantial injury. I mean, just applying it like Judge Ronayne Krause had mentioned in the criminal context. You know, if you suppress a confession and you go to trial and he's found not guilty, there's no appellate review, right?

Or the reverse is if it's not suppressed and it should be suppressed and someone's convicted, should they have to wait in prison for a number of years to go back to trial for a new trial?

So I think it's either, for me, the clear issue of it being moot if you don't act or error plus some sort of unfair injury or damage to a party.

MR. NELSON: Judge Gleicher, is there anything that we, as practitioners, are doing that you see regularly that is singularly ineffective that you would say please stop?

JUDGE GLEICHER: Actually, no. I mean, I think in terms of the civil -- I think those who seek interlocutory review in civil cases tend to be more experienced practitioners. That's just -- and remember, we see interlocutory applications based on our districts, so I don't see anything except some criminal leave applications coming from other districts. But the civil ones, for the most part, only come from the second district that I see, and, you know, I see very high quality work.

I would say on the ones that are denied, sometimes the lawyers really I think are hoping for a different panel or doing a little judge shopping, and that's kind of obvious to me. But you know what?

That's part of the practice, and I'm not going to criticize anybody for doing that. They can -- you know, if they think they can stop the train before the trial given the luck of the draw who they get, go for it.

JUDGE RONAYNE KRAUSE: Can I add one thing, Matt?

MR. NELSON: Absolutely.

JUDGE RONAYNE KRAUSE: It's not something, you know, that I don't want to see. Actually, what I want to see and the thing that I have the biggest problem with, and I didn't understand it when I first got there, is that if you don't send it to us, we don't have it. So if you need me to read a transcript of a deposition, I'm happy to do that, but you have to attach it because the record's not coming, so I don't have everything.

And then what we have to do is then we have to order the record, and sometimes that causes a real delay in an application. So whatever you send, you know, you need to attach whatever it is you want me to read on that application, same with the person who's responding. I need to have all that at my fingertips so I can look at everything that you want me to review.

JUDGE GLEICHER: Can I just take a moment to give a shout out to our commissioners --

JUDGE RONAYNE KRAUSE: Yes.

JUDGE GLEICHER: -- on the Court of Appeals, because one of ours is here. And we get -- when we're on motions, we get probably on average 10 to 12 civil cases with applications per week, which is an enormous amount of briefing, it's a lot of reading, and we could not possibly do it without the help of our commissioners who summarize all of the arguments for us and at the drop of a hat will, in fact, get the record --

JUDGE RONAYNE KRAUSE: Exactly.

JUDGE GLEICHER: -- or do whatever they need to do to get the record. So I'm always in awe of how they can pull together reports in those cases that are so thorough so quickly. But we couldn't do what we do without them.

JUDGE RONAYNE KRAUSE: Same. Thank you, commissioners.

JUDGE GLEICHER: Yes, thank you.

(Applause)

MR. NELSON: So, Judge Gleicher, one of the comments you made earlier referenced the fact that you're looking for a close legal issue, and there are certain types of decisions that not only are not limited to legal issues, but also -- interlocutory decisions that are not limited to legal issues, but also tend to have a dispositive effect on cases or a significant effect on the litigants. And specifically some of those that we've

been able to come up with are preliminary injunctions, orders affecting child custody now with the new change in the court rule, and then also a class certification.

In each of these instances, either someone's liberty or constitutional interests are taken into account or affected or, with regard to class certification, the grant or denial of class certification is usually the end of the case. I mean, there's a settlement after that because it's either not worth pursuing if there's no class certified, or if the class is certified, the risks are too great for the defendants.

Should these sorts of cases get some sort of preferential treatment in the application process? Perhaps they do already informally, but should that be something that happens?

JUDGE GLEICHER: Well, the child custody cases do. Anyone who thinks that they should jump to the front of the line is welcome to file a motion for immediate consideration, and that can help. I mean, assuming you can justify why your case needs immediate consideration.

You know, I think that we are a high volume court, and my sense is that there is triage, very effective triage, that goes on in our commissioners' offices. I think that when these interlocutory appeals come to us, our commissioners are very well aware of scheduling orders that have been entered in the court, so they know how close we

are to a trial and how important it is that there be a turnaround on these cases as soon as possible, so I think it's happening.

JUDGE RONAYNE KRAUSE: And I just wanted to add to that a very specific example where our court took a case very -- we had to do it very quickly because there was an order that a child was going to -- had to be driven by a sheriff -- I'm trying to make sure I get these facts right. Child had to be driven by a sheriff to the airport to fly to Saudi Arabia.

I mean, which initially I just looked at this and thought, I'm sorry, did no one see Not Without My Daughter? I mean, come on. It's not part of the Hague Convention, for God sakes. So anyway, we had to take immediate action and order that that child did not have to be taken to the airport so that we could do a thorough review.

Now, there's an application that got immediate attention and certainly got my attention right away, and we took care of it, and then I don't -- after that, you know, whatever happened, I wasn't on that panel.

But, you know, that was -- that's the kind of thing where you need to look at it immediately because once the child's in Saudi Arabia, you know, you can't get the child back necessarily. And maybe that's where the child will end up going, and that's fine, but I wasn't

going to do that with the child being driven by a sheriff to the airport. I didn't do that. I didn't do that.

MR. NELSON: So there's certain types of cases, obviously, where you need to have -- you need to fast track the application. I think there's a breakout session on that tomorrow. But some of these sorts of decisions are because they have a dispositive effect on the litigation, from a litigant's perspective, it's important that the application be granted to deal with the -- that order, perhaps not on a rushed basis, but certainly before final judgment because there won't be a final judgment.

And does that warrant, Judge Cameron, some additional consideration? Should there be perhaps a rule in favor, a presumption in favor of granting in those sorts of cases?

JUDGE CAMERON: So a presumption of granting an application because the consequences would no longer require a final judgment? Eventually it would moot -

MR. NELSON: Right.

JUDGE CAMERON: -- the need for a trial or a final disposition.

MR. NELSON: Well, there's certain -- so class certification -- for example, if class certification is granted and it's not reviewed, those are very -- exceedingly rarely tried. Usually that's it. Preliminary

injunction, if someone is subject to a preliminary injunction, there's not immediate review. There's a exceedingly strong influence at that point to settle it, to reach some sort of accommodation because you're bound by this order for the pendency of the case.

Are those the sorts of things that perhaps the Court of Appeals maybe, like I said, informally already does or should be more presumptively granting those cases, even if it's a mixed question of fact and law?

JUDGE CAMERON: Well, I think if we're confronted with a situation like Judge Ronayne Krause had mentioned with a child being driven to an airport, you know, I think we all when in doubt, if it's a close call or we feel as though the decision, we won't be able -- the litigants will not be able to get to the end of the line of the litigation because of some intervening fact and the law's not clear that that's not going to be the prevailing party, then I think we -- I don't know if it's a presumption of granting leave.

I think that's something that each judge has to make that decision for themselves, but I think -- I think what you're hearing, at least on this group of people up here, is that we would tend to grant in that situation.

MR. NELSON: So I have a few more questions, but we're getting to the end of the time we've allotted for this particular topic. Do we have some questions from the audience?

MS. MASSARON: We do, a couple of questions. The first one has to do with when the court gets what is an interlocutory application, and rather than either granting the application or giving a preemptory opinion on the application, simply denies leave for lack of merit on the grounds presented.

And we all know that language has historically been used when somebody has blown their claim of appeal and now they're coming to try to save themselves, and they want that language because, otherwise, they might face a serious malpractice claim and that would be a problem for them, and also their client now knows the court has ruled on it.

But in the interlocutory context where you're not in that situation, I think practitioners, particularly on the civil side, have viewed the process as one in which they're either going to get some kind of review or they're going to get a denial and it's unlikely that there's going to be sort of a death penalty, one sentence ruling.

So the question that this person asked, and it came up in one of the breakouts this morning, is when does the court use that language in an interlocutory

appeal? What prompts the court to use that language? So is there some predictable practice that we could all know about in advance?

JUDGE GLEICHER: I don't know that there's a predictable practice. I'm trying to think about how often we use it. I have noticed a trend of using it less and less and less as time goes by, but I attribute some of that to practitioners realizing that certain applications are very risky, and maybe you don't want the issue -- maybe you think you want the issue decided before the trial, but maybe you'd be much better off just rolling the dice and going to trial and then presenting it to a panel that has an opportunity to look at it in a more thoughtful way than we do on these applications.

So, I mean, I know I look at every order very closely to try to decide is this -- do I want to impose the death penalty on this issue. So, you know, I don't have a sense that we do it a lot in our district, but --

JUDGE RONAYNE KRAUSE: No, I agree. I mean, it really depends. It depends on the case, of course, but I can't say with any certainty when that happens. I will say that on criminal cases I particularly don't want to attach any prejudice for it being - for example, for it being remanded later on that issue. It could go back down to the trial court, so I wouldn't want to make it a final -- like it's never going back down.

Just based on what I have right now, I wouldn't send it back down or I don't think that this needs to be addressed right now, but that doesn't mean it can't be brought up on the -- if we use that language, be brought up again if there's a trial and then there's a full plenary review of the entire record.

MR. NELSON: And, Mary, maybe one more -- one last question before we switch topics? Sorry, Judge Cameron?

JUDGE CAMERON: No, that's fine. Perfect time.

MS. MASSARON: The last question has to do with categories of cases that create mootness problems that weren't -- they're a little bit different than these cases like privilege, cases like disclosure of FOIA documents, cases along those lines.

What's your thinking about whether there should be either a rule that allows an appeal as a matter of right -- and certainly the federal courts allow an appeal as a matter of right in the injunction context -- and the likelihood that the court would take those cases without waiting for the case to proceed or putting the party in the position of ignoring a court order and being sanctioned in order to get review? That's the question.

JUDGE CAMERON: So I don't know how I feel about a court rule on that, but I can tell you that if an application is clear to me that, whether it's a discovery issue or a FOIA issue, something -- you know, you can't unring the bell if we wait too long. If it's something like that, then I personally am going to be -- and it's clear to me, I'm going to be inclined to grant the application, if I view it as something close to a close call. If it's not a close call and it's that issue, I don't know how I would rule in that situation.

JUDGE RONAYNE KRAUSE: Well, for example, one of the issues we deal with too that becomes a moot issue are PPOs. I mean, I can't tell you how many PPO cases we've had where ultimately, you know, it's moot because the PPO's expired. However, I know that we have, on occasion, still published cases from moot PPOs because we knew it was going to come up again.

So the interesting question is, is it something that is going to reoccur and something that we need to make a decision about? I mean, it's just not the general case, but I do believe that there are times that we look at things like that. It depends. I mean, but I don't think we want to do that regularly because we have a lot of non-moot issues, quite frankly. I mean, my goodness.

JUDGE GLEICHER: I would really be opposed to a court rule expanding that ability. I mean, the costs of

litigation are already high. This is a doubler for in many cases, if not more. I mean, I think that the statute on -- or the court rule on governmental immunity is misused. I mean, I think we get all these cases that have nothing to do with governmental immunity on automatic appeal like -- well, I won't go into it, but, you know, I think that this is -- you know, we don't need more.

MS. SWANSON: So now we're going to move on to our discussion of published versus unpublished decisions. At the second bench bar conference, one of the discussion topics pertained to what were then paragraph opinions, which the court had a practice of issuing maybe in the late '80s, early '90s, where there was no discussion of the facts, no discussion of the law, and no application of the law to the facts. And I'm told that Justice Markman and Judge Gary McDonald at the time did a point-counterpoint on that issue, and Justice Markman advocated in favor of published decisions.

What seems to be uppermost in our minds now is the ratio of published to unpublished opinions, which, as the slide shows, is approximately ten to one. And I know we have a court rule, MCR 2.7 -- 7.215(B), which sets forth the requirements for mandatory publication, such things as if the case establishes a new rule of law, if it construes a matter -- a case as a matter of first impression, if it interprets a statute, regulation,

constitutional provision, if it invalidates, and so on. I think we're pretty familiar with that.

But what I'm wondering is, does the Court of Appeals also have the discretion to publish an opinion that might not meet the requirements for mandatory publication, but that might otherwise be something that should be published, and what are the factors that the court will consider in deciding whether to publish in that instance? Judge Ronayne Krause?

JUDGE RONAYNE KRAUSE: Well, I think that's a very interesting question, and I just had this question when I spoke at my last seminar where I was actually pretty much grilled on this particular issue. But I will say this, that I think that we can -- I mean, the reality is any one of us -- and the court rule says it, any one of us before the case is released can require publication, and it may not fit the court rule, and one of the judges can just decide "I want this published," and it's published, even if the other two don't think it's worthy of publication.

So that decision can be made for a number of reasons. I mean, one of the cases that I wanted published, and I remember I was sitting with Judge Gleicher, I was fairly new to the bench, and one of them -- and it had to do with a common law marriage.

And there was a sexual assault in the common law marriage, and I wanted to publish. And, of course, you know, we did get rid of spousal rape in 1988 in this state, so that's good.

But at any rate, I wanted to publish the case, and I was new to the bench. It had to do with the fact that I knew that I had had a Court of Appeals opinion once when I was in Washtenaw County as a prosecutor that basically said, well, you know, they were together for a long time, and so, you know, kind of like just let it go, and it was a very bizarre opinion.

And, actually, it's one of the reasons when this opening came up for to be on this bench, I thought, you know, I should be, I would like to be on that bench. You know, that's a good thing. I think we need to, you know, be able to get up there and try to do the right thing.

So I wanted that published for the reason that I think that a lot of people don't understand, that a common law marriage is just like a marriage and you can't -- you know, you can't rape your spouse still in Michigan. So I wanted to make sure that was clear, and I wanted to have a published case that said that, and Lisa was kind enough to continue to sign on with it. I can't remember who was with it. Maybe Deb Servitto, Judge Servitto. And

she went, "That's fine with me," and we went ahead and did it.

But it's a very tough call to decide if to publish or not to publish because one of the things -- one of the interesting factors, and it's kind of sad actually, but, I mean, we have a reporter's office that has to go through every published decision. So sometimes people think we're being lazy by not publishing, but we only have so many reporters, and they have to review anything from the Supreme Court, they're required to do that, and then they have to review everything that's published from our court. So we have to be careful about not over publishing really because we don't have the resources, in my opinion, in the reporter's office to keep up with all of that.

So I think the decision, it doesn't have to be under necessarily the court rule, but I think it should be most of the time. I also think that we have to talk with our colleagues. And I have amazing colleagues. I think we have a great bench, and we're a very collegial bench, so we talk about what we want to do and what decisions we want to make and which ones we want to have published or not.

If we don't agree about that, then sometimes you'll see a footnote saying, "Gosh, I wouldn't have published this, but I had to because the dissent made me." You know, because sometimes if it's too ugly, I don't want

it in a book if it's a lot of arguing. I just don't want it in a book. I don't want a lot of arguing in a book anything negative because we really aren't that kind of bench. So I'm talking too long, so sorry about that. But that's like a long answer to a short question, sorry.

MS. SWANSON: Judge Gleicher, anything to add?

JUDGE GLEICHER: You know, I think we can publish what we wish to publish. I think it's always a good idea to talk to your colleagues about it first. I would add to the list something that we do regularly, and that is if there's a case of public interest or that we believe is of possible public interest, we may publish on that if the case has been in the news and people might find it interesting. But other than that, nothing really to add.

MS. SWANSON: Judge Cameron?

JUDGE CAMERON: Yeah. I think my guess is if you spoke to every judge on the Michigan Court of Appeals and you asked the question do you think too many cases are published, they're going to say no. I think that if we believe that a case falls under 7.215 and we feel it's a new rule, it's a case of first impression or an issue of first impression or we're analyzing a statute that hasn't been analyzed before and we have the right set of facts, I think -- my guess is ten out of ten times that case is going to be published. And, I mean, that's my feeling about that. I think some judges probably push for

publication more than others, but I think that's probably based on their interpretation of the rule and how broad it is.

JUDGE RONAYNE KRAUSE: Right.

JUDGE CAMERON: So I think we all recognize that we'd like to publish more, but we're operating within 7.215.

JUDGE RONAYNE KRAUSE: And sometimes the person who wrote the opinion isn't the one who thinks it should be published. I mean, sometimes I read something that somebody else wrote, they weren't thinking about it in those terms, and I say, you know, I don't really think I've done enough research on this issue now to feel as though there's not enough information out there on this particular topic with these facts. And normally my colleagues will publish if I think it's important, so, I mean, I think we get along pretty well.

MS. SWANSON: So to follow up on that, I'm wondering at what point in the process is the decision to publish or not to publish made and if the analysis and the workup of the case toward reaching a decision differs based upon whether the case is going to be published or unpublished?

JUDGE GLEICHER: Well, it should start with the briefs. If the litigants think an issue needs and warrants publication, then you should tell us --

JUDGE RONAYNE KRAUSE: Right.

JUDGE GLEICHER: -- because that will play a very strong role in how we consider publication. If you -- you're the experts on whether or not this is a groundbreaking area, so please let us know that.

Second, prehearing usually lets us know if the case merits publication under the court rule, and I think those are our two largest contributors.

If we are thinking about publication, we will circulate a draft opinion so designating and will warn our colleagues that we're going to publish, and they can consider that as they decide whether or not to agree or disagree.

I will say, and I don't know if it's another question, but another area that comes up, and maybe you were going to address this, is the post-publication -- post-release motions for publication. Is that a different topic or --

MS. SWANSON: No. Go right ahead.

JUDGE GLEICHER: I mean, we have on our bench very, very different opinions about whether or not once a case is released without publication we should publish because the winner, usually, about 99 percent of the time would like the case published.

JUDGE RONAYNE KRAUSE: Now, if it's the loser --

JUDGE GLEICHER: Well, you know, my view personally -- luckily we have a court rule that requires unanimity in that circumstance. Unfortunately for those who make the motions when I'm on the panel, you're going to lose because I view those motions as basically the vanity press, you know, where the winner says, "Oh, three judges, you guys are brilliant, why don't you publish this gorgeous piece of work" that, you know, could very well have been written entirely by the prehearing department, but okay, we can say we will publish it. But I always say no, so -- and luckily I have the veto power.

So, you know, I think publication should be the exception and not the rule, and it should be reserved for the extraordinary circumstances that are set out in the court rules. So that's a long answer.

JUDGE RONAYNE KRAUSE: Well, and just to add to that, I would say that that's not the same with me. I mean, I will look at the reasoning and make a decision, and sometimes I say no and sometimes I say yes. But I agree, most of our opinions should be unpublished.

The other thing that I do sometimes is circulate an unpublished opinion and put in the email, "Here's what I'm concerned about and why it might apply under the court rule. I really would like the input from the other judges on whether or not you think this should be published." So not presuming it should be published,

but asking input from my colleagues as to whether or not they think that we should publish, so --

MS. SWANSON: So with respect to unpublished opinions, I think we all have the assumption that it would be harder to get an application for leave to appeal to the Supreme Court granted from an unpublished opinion than from a published opinion.

So I'd like to ask Justice Bernstein and then also Justice Markman, on what type -- in what types of cases would you consider granting leave from an unpublished decision of the Court of Appeals?

JUSTICE BERNSTEIN: Well, you know, it's interesting because I was going to answer by saying this, and being kind of direct -- hopefully it won't cause too many waves -- I think that leads to a bigger question, not just about published versus unpublished, but also I am just going to go for it and talk about per curiam opinions as well based on the question I was asked. And, candidly, I don't believe in per curiam opinions. And I know we're talking about publishing versus unpublishing, but I think we might as well just go with the whole thing.

MS. SWANSON: That was my next question -

JUSTICE BERNSTEIN: Oh, okay.

MS. SWANSON: -- so go right ahead.

JUSTICE BERNSTEIN: I think we might as well just, you know, dive in, you know, the whole thing. I

really think that it's our job as judges to make very difficult decisions, to make challenging decisions, and I believe that our name should be on every document that is sent out.

I think when I see a per curiam opinion, it sends me a great deal of concern because what I take from it is the idea that this is a very difficult case or a very controversial matter and the court wishes to have its voice in that, but that people don't want to have it attributed to them.

I think that ultimately when we deal with this issue in the whole, I really believe that when you're a judge and you sign an order and that order is going to impact the life of someone else, either in a civil or criminal context, I believe that you speak with the voice of the court, and I believe that you speak with the power of the system, and I believe that every decision that comes out is a decision that people should know who authored it, who signed it, and what their rationale and what their reason is behind it, for that is why we call it an opinion.

MS. SWANSON: Justice Markman?

JUSTICE MARKMAN: Well, I guess I'd like to talk a little bit more about per curiam opinions when we get to the sheer number of opinions because I think it's of some particular relevance there, although I do very

much agree with my colleague, Justice Bernstein, that transparency in the opinion process is very, very important and there are a number of things the court's doing that are diluting that transparency.

Concerning published/unpublished opinions just for a moment, though, when I say what I'm going to say, I'm not pointing fingers at anyone. I'm as complicit in the problem as anybody. But I do think it's a serious problem with the system that the Court of Appeals is not writing more opinions where the court rules seem to require such opinions, and I think it's an equal problem that my court is bent on disparaging unpublished opinions.

The result of that is well over 90 percent of the appeals that we get I think are effectively immunized or shielded from effective review, and that's not fair to the parties. And I think the combination of these trends, that is the lesser amount of publication by the Court of Appeals and the lack of regard of my court for the integrity of unpublished opinions, the implications I think are there for the equal rule of law, that is, if you're the loser in a case that's not published, you have a much lesser chance of securing review than if you are the loser in a case that's published, and that seems to me largely a serendipitous decision by the Court of Appeals that shouldn't practically affect your prospect of success on review in my court as much as it does.

Secondly, I think it implicates the judicial power generally. We have no power under the constitution, under the federal or the state constitutions, other than the exercise of the judicial power. Our published opinions, our unpublished opinions are equally functions of the judicial power, and I think they should be respected as such.

And while there are peculiar reasons why a judge on the Court of Appeals might wish to have an unpublished opinion rather than a published opinion, just as there are reasons on the Supreme Court why we might wish to have a per curiam or memorandum opinion rather than authored opinion, I don't think those things should cast dispersions upon the fact that what we're all doing in all of those modes of

decision-making is to exercise the judicial power. We have no other power. And when the Court of Appeals exercises its power to issue an unpublished decision to me, it has all the force and the majesty of the law as the most thorough published opinion of the court does.

And third, I think it has implications for gamesmanship in the process -- and we're all susceptible to that potentially given some of the practices that we have -- and the bearing of bad decisions in unpublished opinions. I do think that happens.

I don't know that it happens purposely or consciously, but I think the practical impact of our court's attitude toward unpublished decisions is that when there's some doubt about the law that's being articulated to the Court of Appeals, it's always easy to practically and pretty decisively immunize that case from Supreme Court review by means of an unpublished opinion.

I think all these things coming together are really having a harmful impact upon both courts and upon the kind of guidance the judiciary is providing to the bench and bar in terms of the development of the law in Michigan.

I think more published opinions by the Court of Appeals would not only be compatible with what I view as a fairly broad court rule, 7.215, but I think it would also be compatible with the idea that as many decisions as possible are going to be held up for further review by the Supreme Court by virtue of having the kinds of opinions, a little more thorough opinions with some factual basis and some modicum of legal analysis, so that they can secure effective and genuine judicial review by the Supreme Court. Going on too long, but I do think there's a problem there.

(Applause) JUDGE GLEICHER: May I?

MS. SWANSON: Go ahead.

JUDGE GLEICHER: I think it's imperative that there be a response to that, Justice Markman, and here's the response. Number one, by saying that the publication decision is serendipitous, what you're really saying is that the judges on the Court of Appeals are refusing or failing to follow the court rule, and I take great exception to that.

There are three judges on every panel in which a publication decision can be made. It takes one to decide that there will be publication, and that can be the dissenter. In my years on the court, it has never happened that a judge has said, "Based on the court rule, we need to publish this case," and another judge on the panel has taken exception to that view. That's just not how it happens on our court.

So what you might be saying, and what I think you are saying, is that perhaps we are too lazy or too improperly informed about the court rule to publish those cases that, under the court rule, need to be published.

And again, as I said earlier, the pathway to publication is not built once the case is in the chambers. It starts with the briefing, it then goes to prehearing, it then goes to three judges and three different law clerks, all of whom can weigh in, all of whom know what the court rule says. So it is not serendipitous under any stretch of the imagination.

MS. MASSARON: I --

JUDGE GLEICHER: That's point number one.

Okay. Go ahead.

MS. MASSARON: No, no. Go ahead. I had a question--

JUDGE GLEICHER: Number two, if there's a problem with the court rule--

MS. MASSARON: -- but when you're done.

JUDGE GLEICHER: -- if there's a problem with the court rule and it's not generous or capacious enough, then fix the court rule. We will follow the court rule. And I would welcome the Supreme Court providing us every month after your conferences with a list of those cases that you reviewed in conference that, in your view, should have been published under the court rule.

I am the chairman of the Rules Committee on the Court of Appeals. I will take that back to the Court of Appeals and make sure it gets prompt and thorough attention if my colleagues are not enforcing the court rule. But I have to tell you, I sit with everybody -- I've sat with every single judge on our court, and I have never experienced any judge who would have deliberately failed to publish a case that merited publication under the court rule. Never.

JUSTICE MARKMAN: Well, I think you take exception a little too quickly.

JUDGE GLEICHER: Okay.

JUSTICE MARKMAN: I don't believe I disparaged anybody, but I pointed out that the culture of the Court of Appeals for many years, despite changes on the part of the Supreme Court in broadening the kinds of cases that should be published, is such that well over 90 percent of their cases are not published. And I think that if anybody looks at the language of 7.215, you will be very hard pressed to see that not well over 90 percent of the cases going to the Court of Appeals are cases that don't warrant publication under the court rule. They do.

It's not disparagement to the justices on that court on the Court of Appeals. It's more function perhaps of the fact that there are eight different panels that have different attitudes and different approaches to common issues, and sometimes there has to be a greater effort on the part of the Court of Appeals to recognize that and to allow the Michigan Supreme Court, just as the United States Supreme Court does with respect to federal district and circuit courts, to reconcile the differences between those panels as opposed to unpublishing those decisions so there's no effective opportunity on the part of the Supreme Court to render consistent and to facilitate the rule of law in this state by having the effective opportunity once again to review those decisions. Nobody is suggesting the kind of disparagement

that I think you're understanding me to say, Judge Gleicher.

MS. MASSARON: If I could ask a question that I think it's fair to say -- I'll preface it with this comment. I could be wrong. I think it's fair to say that many people in the appellate bar, as long as I've been practicing, have expressed concern about the percentage of opinions that are published.

And many appellate lawyers can and will, if asked, point to unpublished decisions that announce a rule or interpretation of a statute that's never been interpreted in a published opinion or that conflicts with another unpublished opinion. People can point those out, and they do.

So you have said, and I understand this, you're talking about how does the process identify which of these cases should go into that bucket of publication, and one of the things that the question arises from is -- and I think Justice Markman talked about or maybe you talked about gamesmanship, and there is a strategic question for the advocate about whether or not to ask for publication at the time of briefing that makes it less likely that that's going to be a good filter for identifying the cases that should be published.

Because many times if it's an elaboration, an extension of a published opinion, you might not want to

point that out in the -- if you're the one that's seeking it because it's going to make that more obvious and you're trying to say, "Look, it's like this published case."

Is there some other mechanism that we could think about that would allow those cases to be identified so that the ones that should be published end up being published? And I understand your concerns about the post-motion from the parties. The rule doesn't allow nonparties to speak at all, and there's a general issue that goes beyond the parties. I don't know, we may not find an answer to this question, but that's what the question is.

JUDGE GLEICHER: Mary, maybe I'm misunderstanding the question, and I'm going to try to recast it, but if I've done that unfairly, please let me know. I mean, it seems to me that what you're asking is if the lawyers -- if the advocates think this is potentially a publication-worthy issue, for example, a statute that hasn't been interpreted in 50 years and because of the passage of time needs reinterpretation in light of new modern realities, for example.

If that's in my head and I'm the advocate but I'm thinking, "Well, what if I lose? Then I don't want the published opinion." Well, I mean, can you blame us then if you haven't asked for the publication? And, you know, that's gamesmanship beyond -- is that what you were asking because --

MS. MASSARON: The question is trying to get at the point that the advocate is speaking narrowly for the advocate's client, and there is a broader issue or interest of the bar in what gets published.

JUDGE RONAYNE KRAUSE: So the court rule could be changed to allow folks that are not involved, but that's not up to us. And then the other part -- I'm sorry, Judge Gleicher.

JUDGE GLEICHER: No, keep going.

JUDGE RONAYNE KRAUSE: Okay. That's one thing. The other thing is that if it, in fact, is that you're saying that there's a new interpretation of the statute and it fits under the court rule, then a motion for -- again, I understand what Judge Gleicher's saying, but, I mean, you have to bring it. You have to bring the motion for publication if we didn't do it, if you think we did it wrong.

But I also think that her point that as an advocate you're trying to protect your client, and I get that. I completely understand that. But, again, if you don't ask for it beforehand -- even at oral argument you could ask for publication. Say this is a matter worthy of publication because under the court rule here, this, whatever it is.

If you really want it published, say it out loud in the brief or at oral argument because, otherwise, we don't know that's what you're thinking and we may be reading things differently than you are. That doesn't make -- I mean, that's what the law -- I mean, that's what we love about the law, right?

Everyone can look at the law differently.

JUDGE GLEICHER: And as I said to somebody yesterday, I mean, for example, in the family law world -- I don't practice family law, I never did. If you've got an issue that's really important for the family bar, tell us that, and we are right --

JUDGE RONAYNE KRAUSE: Right.

JUDGE GLEICHER: -- we understand that there are not enough family law cases published. Help us.

MR. NELSON: So I'm --

JUDGE GLEICHER: We want to help you.

MR. NELSON: I am going to interrupt the judges --

JUDGE GLEICHER: Good. Thank you.

MR. NELSON: -- which is something that I feel like I'm taking my life into my hands here.

JUSTICE MARKMAN: Can I interrupt you for a second, please?

MR. NELSON: And I've been interrupted, so --

JUSTICE MARKMAN: I just want to emphasize that I made clear I think in my earlier remarks that there was joint responsibility for this --

JUDGE RONAYNE KRAUSE: Right.

JUSTICE MARKMAN: -- not just the Court of Appeals. I said with respect to my court we should be less disparaging of unpublished opinions, suggesting that somehow they're second class opinions and they're not real exercises of the judicial power. And by doing that, I think we put some pressure on the Court of Appeals to recognize that those opinions, even their unpublished opinions, have to be more like real opinions.

JUDGE RONAYNE KRAUSE: And, Justice Markman, you have taken up -- an unpublished case that I had, you took it up, and you did treat it with -- I mean, your whole court did. I mean, so I don't think that unpublished opinions mean they're not going to go to you.

JUSTICE MARKMAN: So if I did that, it was undoubtedly a good unpublished opinion that laid out some of the facts and some of the analysis and allowed us to review it. The whole purpose of unpublished opinions is for those circumstances -- perhaps the majority of circumstances, but not 95 percent of the circumstances -- in which the law is clear and settled and the issue on appeal is a fairly pedestrian issue and it doesn't

warrant the attention, the time, the energy, the involvement that a published opinion would require.

When those opinions that shouldn't be -- that don't need to be published are not published, there's not going to be a problem. It's only in those cases in which there are -- there is a basis for publishing, and there's a large basis for publishing I believe under 7.215. But in those cases in which publication seems to be warranted or is arguably warranted under the statute and it's not published, those are the tough cases.

Those are the cases that really befuddle my court, and I think we should do a more aggressive job in communicating, as we've tried to do in the expansion of 7.215 itself, but I think we have to do a better job in communicating that there are cases that are not being published that deserve and require publication, not because anybody is trying to bamboozle the court in any way or they're lazy, but simply because they're not reading the court rule as reasonably -- in as reasonably expansive a way as they could do.

MR. NELSON: So I'm going to now turn the focus from the Court of Appeals to the Michigan Supreme Court. Historically in this country, the appellate court's issued many more opinions -- and this is across the board, state appellate courts and the U.S. Supreme Court -- in the '70s, '80s, and into the '90s.

For example, the U.S. Supreme Court -- for those of you that follow the U.S. Supreme Court know that there's been considerable press attention about the fact that the -- in the 1980s the Supreme Court -- the U.S. Supreme Court heard arguments and issued opinions in over 150 cases per year. By 2014 that number had fallen to 71, and in the 2016 term, it was the fewest since World War II, just 64. And the Supreme Court has, you know, gotten some considerable coverage on that.

We've seen a similar decline in the number of opinions issued by the Michigan Supreme Court. From 1992 to 2003 the court issued 75 to 100 significant decisions a year. And by significant, I'm using cases -- or decisions that were reported that were assigned headnotes by Westlaw, so they had enough analysis that Westlaw in the reporters assigned headnotes. In 2004 that number fell to 51, and in the last ten years the average has been about 35. What factors have played into the decline in decisions from the Michigan Supreme Court? Justice Markman?

JUSTICE MARKMAN: Well, let me focus my attention on the sins of my court, myself and my court. Although I do believe that the overwhelming deluge of unpublished opinions we get from the Court of Appeals does have at least a slight effect on that.

JUDGE RONAYNE KRAUSE: Oh my goodness.

JUSTICE MARKMAN: Let me say you're right in the data that you cite, Matthew. That's exactly right. The number of opinions when I began as a member of the court was typically 70, 75, even slightly more than that in terms of the number of opinions we published each term. It's down to 30 and under, and it's -- the trajectory is not looking very bright at this point.

But it's not just the number of opinions, it's the fact that there are less authored opinions. Per curiam opinions, I agree with some of Richard's sentiment on that. To me, a per curiam opinion suffers from the fact that it's essentially a socialized opinion. As Richard indicates, nobody is the author of the opinion, nobody is responsible, and just the way human nature operates, and judges operate as a function of human nature the same way as everyone else, they're just not on their best behavior in those opinions.

When I write an authored opinion -- and I know there's a lot of people in this audience who say, "Boy, I mean, those aren't such great opinions either," but I try my best in those opinions. I really struggle and I work hard on those opinions because I know it really does reflect on me personally as well as my colleagues on the court, and I try to do my best on those opinions, however imperfect my best might be.

A per curiam opinion, I think maybe contrary partially to what Richard says, does have a role in some instances, and perhaps even more so, a memorandum opinion has even more of a purpose under certain circumstances. I see a memorandum opinion being particularly appropriate when the Court of Appeals has said something interesting or new or useful or valuable and we agree with it.

We don't want to just parrot what they've said, but we largely do that in a memorandum opinion. The facts are sparse, the analysis is lean, but at the end of the day we say we think the Court of Appeals has got it right in this case. The pages of our opinions has been reduced.

We see more unanimous opinions. Now, what's wrong with more unanimous opinions? It would seem like that's a good thing. And everything else being equal, a unanimous opinion is great. And, indeed, about 90 percent of all the decisions of my court I'm proud to say are unanimous. Whether they come from people with Republican backgrounds or Democratic backgrounds or conservative or liberal backgrounds or prosecutorial or defense backgrounds, slightly over 90 percent of our opinions are decided unanimously.

To me, that communicates we're not just doing -- to use the phrase that we heard at lunch -- politics by another name. We're doing something much different.

But in the other 10 percent of cases, the hardest cases, the most divisive cases, I think the court would be generally better served by identifying fewer unanimous-oriented opinions and embarking upon tough debate.

You know, it's -- when you consider the types of cases that come to the Supreme Court, people have got to wait for years to have those cases decided, they've been bloodied and bruised by those cases, they've lost sleep on the part of those cases, they're absolutely the toughest cases, and to think that we're taking the toughest cases where we routinely decide them unanimously just doesn't jive, in my view, with what the reality of the situation is.

These are the cases that implicate our jurisprudential premises and our approaches to giving meaning to the law the most clearly of any of our decisions, and we shouldn't be apologetic when we have divisions and dissents and concurrences and difference of opinions over those cases because those are the remaining cases after we've demonstrated our consensus in the 90 percent of the cases that have come. So to me, it's suggestive of the fact that, for whatever reason, we're not granting on the most important cases in which the bench and bar of our state need the guidance of the highest court of their state.

And what's worst of all -- I apologize forgoing on so long but what's worst of all in my opinion -- and you have a right to complain if this is your sense, if you agree with my sense. If you don't, so be it.

But when we take important cases and we don't decide them, we remand them through several more levels of consideration by the trial court and the Court of Appeals where we don't need to, where we punt on issues that we've actually explicitly teed up in our orders and yet we give all the hard decisions to the lower courts, I think we owe more to the bench and bar of this state in the most difficult cases that we take upon grants.

We owe you the courtesy and the benefit of whatever kind of guidance and exposition we can get so that you know what the law is, but, more importantly, you know what the law is not only in your case, but as we're wont to say in the courtroom, you in the next 100 cases have some good sense of what that law is. That's what a court of law does as opposed to deciding a case in the sense of engaging in mere error correction on the part of the Supreme Court with exceedingly narrow decisions.

You're deserving of sufficiently general decisions that you can counsel your clients and have at least some rudimentary sense of what the law is going to

be in the next 100 similarly or analogous -- similarly-related or analogous kinds of cases and controversies.

MR. NELSON: Justice Bernstein?

JUSTICE BERNSTEIN: I'm going to yield my time to Steve.

JUSTICE MARKMAN: Well, that's a first.

MR. NELSON: So we have a number of more questions. We've already passed the time that we had kind of set as to when we were going to end this session. I'm going to ask two questions I think are -- one is a yes or no question, and maybe we can explore it tomorrow, and the other question I have a little bit more time.

The first is, with the declining number of cases that are being resolved on the merits, would the Michigan Supreme Court consider adopting a procedure like the U.S. Supreme Court has that allows parties to waive a response to an application, but the court would commit to seeking a response or requesting a response from the non-petitioning party if the court intends to take any further action or has any desire to take any further action with the case? So I guess that's my yes or no question. Would the court consider such a procedure? Justice Bernstein?

JUSTICE BERNSTEIN: You know, it's important, the thing you learn is I'm only going to speak just for myself and not for anybody else on the court, but I would say no.

MR. NELSON: Sorry, and I should have made that clear. I'm not asking for an official position of the court.

JUSTICE BERNSTEIN: Right. My position would be no.

MR. NELSON: Justice Markman?

JUSTICE MARKMAN: Let me defer to our court clerk, Larry Royster.

MR. NELSON: Mr. Royster?

MR. ROYSTER: You know, we actually do that in the criminal context, not so much in the civil. But if they consider some sort of relief perhaps in a criminal case where we haven't got a prosecutor's answer, we will direct the answer. I mean, it's very common. I have no idea in the civil context, and I wouldn't want to even, you know, opine on that.

JUSTICE MARKMAN: If I can say one thing. I do think my court should be granting on maybe more and different cases, but I really do think we do a good job in our criminal jurisprudence. These are cases where we can't apply the traditional standard we apply in other contexts in lieu of the jurisprudential significance of the case or controversy.

You just can't tolerate that somebody is behind bars when he or she perhaps shouldn't be behind bars, and I do think my court really is -- you know, we weren't

eyewitnesses to the crime, we don't know what took place obviously, but I think everybody does take those cases very, very seriously. I think we work very, very hard to try to do the best we can in those cases to avoid incarcerating the innocent or placing back in the community to do further harm people who've already abused people.

But that's one area where I think my court has in particular -- not the only area, but one area in particular where I think we have really granted on cases, whether they're published or unpublished, where we think that there's been an injustice. That's an exception to all the other rules we generally apply to grant or to not grant, and I think it's a wise judgment that we've exercised by in large.

JUSTICE BERNSTEIN: And I think -- just in response, I think that the distinction with the prosecutorial response, which I think as Larry said, we do ask for that, you know, quite often, but I think there's two sides to this, and I think it's a very interesting debate and an interesting discussion. And I can see the other side, and now I'm kind of more interested in this and now I'm kind of more excited about it, but I still would have some concerns about it.

MR. NELSON: So I think in terms of making sure we have enough time for the second group of panelists, I

think I'm going to call an end to this. If we could thank our panel for -

(Applause)

MR. NELSON: And I had said a ten-minute break, but given the time, I would please ask five minutes. If you want to refill your coffee and refill your water glasses, we'll change our panel, and then we'll get started again.

(At 5:00 p.m., recess taken)

(At 5:05 p.m., back on the record)

MR. NELSON: Thank you, everyone. If I could call us back to our seats, we're going to get started again. Our second panel is Justice Bernstein and Judge Gleicher and Clerk Royster again from the first panel, as well as Court of Appeals Judges Stephens, Boonstra, and Letica. So at this point I'm going to turn it over to my co-moderator, and we'll get started again.

MS. SWANSON: Thank you. So as we all know by now, the Court of Appeals has introduced a new rule regarding appendix and -- appendices and what the requirements are. We also know that we have a rule that -- a longstanding rule in the Supreme Court that has required appendices in Supreme Court calendar cases, and the Supreme Court has proposed that that rule now be applied to MOAs as well.

So this creates a situation where we have multiple versions of appendices. We might be filing an appendix that conforms to the Court of Appeals rule in the Court of Appeals, and then we're going to file -- our client authorizes an application for leave to appeal to the Supreme Court, so maybe we're going to refile our Court of Appeals appendix in the Supreme Court.

Then maybe the Supreme Court grants a MOA, and now we have a new requirement and a new appendix, the contents being very similar, but the formatting being different. For example, in the Court of Appeals, the appendix is separate from the brief limited to 250 pages, serial, paginated, and bookmarked. In the Supreme Court we still have to put the headers at the top of the page describing what the content of the page is.

So the question that most practitioners that I've talked to have had is, why do we have these differing appendix requirements and is it possible for the courts to collaborate and have a single appendix that we might be able to use throughout the appeal process, whether we're in the Court of Appeals or the Supreme Court?

JUSTICE BERNSTEIN: I have to say this is not as exciting as the first panel. The first panel was so much more exciting. The title is supposed to be like out of the

box, and then I was thinking appendices. I was like, we all have to get out more.

MS. SWANSON: Well, out of the box only in the sense is there a way -- this is really kind of a practical issue for practitioners, so I don't know if, Justice Bernstein, do you have any thoughts on that? Is collaboration a possibility?

JUSTICE BERNSTEIN: Sure. In all seriousness -- and Larry and I were talking about this yesterday, I definitely think this is something we can work on, and I definitely understand and appreciate the issue that some of the folks have about this. There should be some uniform standard, and it only makes sense. But I'm going to ask my colleague and friend, Larry, to speak more about this.

MR. ROYSTER: Yeah, it's certainly possible. The only thing I'd say is that, you know, in our case management system everything is linked, so we can see what's been filed in the Court of Appeals for the most part and they can see what's been filed with us. But a lot of our orders, whether it's granting leave or directing argument on the application, asks you to specifically identify or address issues, and so it may not be that what was appended at the Court of Appeals is all that relevant anymore and there may be things that

weren't appended at the Court of Appeals that now have more relevance.

So if it's able to be worked out, logistically there's no reason we can't do that. Why the two court rules don't mirror each other, I think it was certainly not intentional. It wasn't that we had special needs that the Court of Appeals didn't have or vice versa. So I think we could work out, you know, some sort of change.

But a lot of this will be moot, you know, some years down the road when we go to a statewide e-filing system where we will have access to the trial court records and it won't be necessary anymore, or perhaps not as much now, to actually append things to the brief. You'll file your brief, and then you can actually refer to things that are electronically available to the appellate courts from the trial record.

JUDGE GLEICHER: Can I?

MS. SWANSON: Judge Gleicher?

JUDGE GLEICHER: Yeah, I just want to say, from the perspective of the Rules Committee on the Court of Appeals which was the driving force in getting the appendix, our committee basically helped shepherd through the appendix rule. We always viewed it as a form of an experiment, so we never viewed that rule as one that would last forever.

We were well aware that the Supreme Court had a different rule. We wanted to bring the concept of an appendix to the Court of Appeals slowly and gradually, and we thought this was a good way to do it. So I know we're going to be very open and, you know, interested in collaborating and getting a rule that everybody's happy with for both courts.

MS. SWANSON: And, Larry, when we were talking earlier with respect to preparation for this, you had mentioned that the Supreme Court is upgrading to a newer version of TrueFiling that might change the way we want to be filing things as practitioners so we don't get multiple notifications from the court. Can you explain what that entails?

MR. ROYSTER: And it's just not the Supreme Court. The Court of Appeals has the same system. We are in the same appellate TrueFiling system. So we just had a staff conference on Tuesday, and they told us that some time at the end of May, early June we will be upgraded to a new version. It's not exactly what's in the pilot courts right now, the trial courts, or that will be in the model courts. We do have our own -- (inaudible). Some of it's configurable, some of it's not.

One of the things that we've been told is not configurable is the notices that you will receive based on how many documents or what documents are in the bundle. So

right now if you were to file the application with the Supreme Court and attach 17 appendices, each one of those appendices could be separate, and depending on what notifications you have, you receive an e-notification, email, saying the court has, you know, accepted for filing your bundle.

Well, under the new system you'll get a notice for the application and separately for each of the 17 appendices that you have. Now, you can turn that off in your notifications, but if you want to get an e-notification, the best way to solve that is just to combine your appendices as much as you can and be under the threshold for the 25-megabyte limit into a single document. So to me, that would be good practice anyways.

You know, in terms of docketing, it's not a huge amount of time to docket separately 17 exhibits, but certainly it takes a lot longer to do one appendices. And like I said, it's a 25-megabyte limit for each separate document. The number of documents within a bundle could be infinitely large, but each document has to be under 25 megabytes. That's a huge document.

And I just docketed one yesterday, I think there was 12 exhibits. Each one was under one megabyte and could have been easily combined and made very usable by bookmarking or using other, you know, kind of indexing

things. But I think it was just a matter of, you know, being fastest for the filer just to, you know, click, search, attach, and then go on to the next one.

So, you know, for me it's not a bad thing for practitioners. Unless you turn off that notification, as soon as the court accepts something or some different status change is made on that filing, you're just going to get inundated with e-notifications to your inbox.

MS. SWANSON: And just one final question regarding the Supreme Court appendix. Is there a utility in having the header at the top of each page now that we're doing electronic filing with indices? Is there any thought that that might not be something that needs to continue?

MR. ROYSTER: Yeah, I mean, the genesis of that rule is in the paper world, and so a lot of the rules that we still have are based on that, and they no longer have as much relevancy in the digital world, so that would be one area that I think you could do it.

But, you know, there has to be some way easily to identify that, and it could be bookmarking, it could be other ways, you know. But I don't think there's anything sacrosanct about that header.

MS. SWANSON: Thank you.

MR. NELSON: So we'll now move back from the very practical world of appendices to the more interesting, perhaps, discussion of esoteric topics.

The first is with regard to the use of prehearing and draft opinions in the Court of Appeals. And obviously most of us are aware that prehearing attorneys perform the initial review of most cases and in most cases provide the court with a draft opinion.

In fact, one of the concerns that I think attorneys frequently have in terms of explaining opinions to their clients are opinions that may have been entirely drafted by prehearing attorneys before oral arguments, and clients look at that and say, "Well, then the ship's already sailed." You know, "Why are we continuing with the process and I didn't even get judges who decided my case?"

So with regard to prehearing, how much involvement does the prehearing attorney have with the panel after the prehearing report has been issued?

JUDGE STEPHENS: Zero.

MR. NELSON: Zero?

JUDGE STEPHENS: I mean, unless we call them, but we're not going to.

JUDGE BOONSTRA: I think they would tell you, and there's some truth to this, that they don't have much interaction with us, and that's our fault in some ways.

But we do get a draft opinion. Some of us use it more than others.

And I would say I completely disagree with the premise that you started out with here in terms of a research attorney writing the decision in the case. That simply doesn't happen. Some people will -- some of the judges will start with that opinion, some will -- and tweak it. Some will work on it a lot, and some of them won't start with it at all. I think Lisa's probably in that category. She starts from scratch.

JUDGE STEPHENS: And you're going to start with the record. I mean, we get a report that says, "This is what I think it said." We're like okay. Two months out of law school. Good. I appreciate that. And you go back and read the record, whatever you have of it. You read the briefs of the parties. I cannot imagine -- I don't even know how a client would think where that would come from that this is a prehearing opinion, except it came from the practitioner who shared that with their client erroneously.

MR. NELSON: So the -- one of the factors that plays into it is this question of in some instances you get a decision less than seven days after oral argument, which strongly suggests, not just to practitioners, but also to clients, that, in fact, before the oral argument there was at least a draft of an opinion prepared, and

what does that process look like? And obviously prehearing plays a role in that process.

I think you've already started to address the question with regard to what checks and balances are applied in the system to ensure that the judicial power, the judicial function, as Justice Markman was talking about in the previous panel, is not being disproportionately exercised or exercised by the lawyers in prehearing?

JUDGE GLEICHER: Well, this might be a question with which I agree with Justice Markman to some extent. I've taken the position in our court that we should eliminate the opinions, that prehearing should not do proposed opinions, that if judges want to cut and paste from the prehearing report, they're welcome to do that if they want to.

So I think that it's too big of an ask of prehearing to do the opinions, and it also -- the absence of the opinion forces the court, the judge and the judge's clerk, to dig deeply into the briefs and the record. And as Mark -- as Judge Boonstra said, in my chambers we don't even print the proposed opinions a lot of times.

But, you know, I recognize that there's another way to look at it too, and that some of the work that we get from prehearing is outstanding. I

would say about 99 percent of the work, maybe 100 percent that we get from senior research is outstanding.

We got one this month from a senior research lawyer, and I hadn't looked at the proposed opinion, but my clerk did, and she came in and she said, "Lisa, this opinion is beautiful." She said, "You couldn't do any better." I said, "Okay. If that's how you feel. I mean, let's fix it up a little bit."

JUDGE BOONSTRA: Is she still working for you?

JUDGE GLEICHER: Yeah, she is. So, you know, I think there are, you know, different ways to look at it. It's not just totally black or white.

JUDGE STEPHENS: And I don't think in any way you're vesting judicial power. I mean, if people had law clerks, the law clerk would give you a document that was their initial analysis of whatever the case is about. So this is a law clerk not chosen by us, but essentially that's what that person is, and they provide us with the ability to reduce the time from your case getting filed until it's resolved. Because your clients -- if we do everything, your clients to whom this is a real case and real life will wait even longer, and they don't deserve that.

MR. NELSON: And so for the sake of the discussion, I think this issue has come up in terms of in this very framing with regard to -- also with regard to

the use of judicial clerks in terms of opinion drafting. In fact, at numerous conferences I think Judge Boonstra and I attended some of these when he was still in private practice and they came up. But wanted to give Judge Letica the opportunity to add anything to this conversation, if she'd like.

JUDGE LETICA: I appreciate the -- I appreciate the prehearing as a start product. Trust me, I still read all the briefs. I'm reading all the briefs. I take a look at it myself. Sometimes I say that's an incorrect analysis on the law, let's start over. It's not a delegation by any, you know, stretch of the imagination.

JUDGE BOONSTRA: I will tell you, I don't, like Lisa -- or Judge Gleicher, start exactly from scratch, but I personally never any longer look at the proposed opinion from the research attorney. I will let that go to my law clerk. I will let him use it as a starting point with my direction if I think it's wrong or we want to go in a different direction, but, you know, there's frankly -- there's too much redlining going back and forth between me and him to look at the redlining he did of what the research attorney did, right?

So we work on it a lot, and we read everything. It's just a starting point. And actually I find it more helpful -- I don't always like the way --

the writing style, because they come with different writing styles and that results in a lot of editing, but I look to them more I think to give me an understanding, a snapshot of what this case is about and what the facts are -- and we'll check the record and make sure it's correct -- more than I do the legal analysis necessarily. Because their factual analysis will tell me what the case is about, and I can make a judgment about whether I think, you know, their legal analysis is correct.

MR. NELSON: So to shift topics of conversation from draft opinions to the assignment of writing responsibility, how are these writing assignments -- how is a writing assignment handled in the respective court? So, Justice Bernstein, how are the writing assignments assigned in the Michigan Supreme Court?

JUSTICE BERNSTEIN: So you know what's great is that Larry has a fantastic system that he uses, and we have a lot of fun with this because Larry has this wonderful system that he uses where basically no one really knows what the opinion's going to be until we go into conference after the case, and it's a very complicated system. There's like a chip and a box, and it's like very, very intense. So what's great is, is that it's such a great system that none of us understand how it works, so I'm going to ask --

JUDGE STEPHENS: Larry can explain?

JUSTICE BERNSTEIN: -- I'm going to ask Larry to explain it. But we know it's fair because no one gets it.

MR. ROYSTER: And I change the rules all the time and no one's ever caught me. No, I take notes from -- it was a hand-me-down from Corbin, and Corbin I think inherited it from his predecessor. But it's just a way that -- you know, a way to cut the deck, so to speak, before the cards are dealt. It is meant to put some randomness in the assignments.

MR. NELSON: And I'm assuming there's some way in that system as well that balances out writing assignments because pure chance could result in one justice getting seven cases and another getting one.

MR. ROYSTER: Yeah, I mean, each justice takes an assignment, and it just depends on whether they're in the majority or minority. But if they are in the minority, they're passed over, but as soon as that case is assigned out to whoever's in the new majority, we go back to the minority, that first judge. And so, yeah, it is never a situation, you know, where one judge gets all of them and all of the -- and the remaining six get nothing.

JUSTICE BERNSTEIN: But can you explain about the chip and the box? There's a box and a chip.

MR. ROYSTER: Yeah, so each case, you know, based on whether it's a calendar case or a MOA has a chip

in the box, and we know ahead of time which ones will have opinions land which ones will have orders based on the discussion of the justices. So the order ones are taken out. Only opinion ones are in the box. And then whoever is next in line to get the first assignment pulls the chip out of the box, and based on that, that's the first case that we assign.

JUDGE STEPHENS: That's way more fun than us.

MR. ROYSTER: I was going to do like a Powerball thing where it pops up, but it costs a lot of money to make that.

JUDGE STEPHENS: What's interesting, of course, is that Larry's responsible for our system too because -- but our system is based upon X number of days, and the days are allegedly, as nearly as people can prognosticate, balanced out amongst each individual on the call. Whether it's an individual -- we used to have box cases. We theoretically don't really have box cases, we have mini box cases.

But it's X number -- everyone's supposed to have roughly the same number of days of writing responsibility, and they are to be randomly assigned so long as you're not DQ'd from the case by a nice computer. But Larry can probably explain the algorithm.

MR. NELSON: It's so funny to follow up on that response. So the number of days has some connection with the perceived amount of time it will take to work the opinion up?

JUDGE STEPHENS: Yes, and to work the case up, including reading that record.

MR. ROYSTER: There's actually two different waiting processes that the court goes through. So when it's in the research division, there's a day evaluation based on, you know, how many transcript pages to be read, how many issues to address, and then we'll determine whether it goes to senior research or prehearing.

But after the report is done -- because sometimes you have a large, you know, box case that has a single issue, and once the transcripts are read, the case could be fairly straight forward. So there's a different waiting system for the actual assignment to the panelists, and it's based on -- I think it's still a 1 to 6 scale. Is that still true? Yeah, 1 being easiest, 6 being most difficult, and, you know, basically each judge gets within perhaps a point or two the same number of total points.

So if you have, you know, 18 total points, you could have three 6 evaluated cases or theoretically I guess you could have 18, you know, 1-point cases.

But it more or less balances out. It's just a way to try and make it fair rather than the random draw

where, you know, you could get a judge with, you know, ten box cases and the other ones have, you know, very small cases.

JUDGE STEPHENS: And we also have a waiting for the people who are in the court of claims, so --

JUDGE BOONSTRA: All I know is every month I get about 30 cases and I'm assigned to 10 of them, and I don't know how it happens.

MR. ROYSTER: Again, you know, we do it because you don't know what's happening so behind the scenes we can say yeah, it's fair. We looked at it, we did it right.

MR. NELSON: So we're going to switch out here.

MS. SWANSON: We're going to talk a little bit about oral argument. And as all of our practitioners know, by the time we receive a notice of oral argument, most of us in the run-of-the-mill cases have not looked at the case for eight or nine months perhaps.

So we get the notice, and we've got to go back through the file, learn the facts again, familiarize ourself with the cases, the arguments, the other parties' briefs and so on because no one wants to be caught not being able to answer a question that's directed to us by one of the judges on our panel.

So around that I'd like to ask the judges what they view or consider to be the goal of oral argument

from your perspective. What does the court want to gain from oral argument? Judge Stephens?

JUDGE STEPHENS: Okay. See, you didn't understand Judge Gleicher assigned me this too. What I hope to glean first and foremost is their response to the things raised by their opponent that they've not yet fully honed in on in their writings. I mean, things may have occurred to you that you said, you know, as I read my opponent's argument, I realize I need to rebut that by pointing out this or that or the other.

I look to hear answers to questions that I have in the margins of my iPad, because I hate paper, and I hope to hear from the questions of my colleagues some other issues that I should be considering that I may not have.

MS. SWANSON: Okay. Judge Letica?

JUDGE LETICA: I'd urge everybody to take the opportunity to file supplemental authority if there is supplemental authority. I've come to oral argument a few times where the parties have said, "Oh, by the way, I represented a litigant and we just received a published opinion," you know, "it was six weeks ago, but now I'm withdrawing issue number" -- so maybe we haven't caught it, but please bring that to our attention.

And please focus your argument. I swear, the speech that you hear at the beginning of every oral

argument, we've read the briefs, we're prepared, it's true. It's true. We're ready. We have questions. I write mine on paper. Sorry. But we're there, we're prepared, we're ready to ask you questions, and just engage in that conversation with us. Please don't read your brief. I've already read it.

MS. SWANSON: Judge Boonstra?

JUDGE BOONSTRA: Yeah, I guess I agree with all of that. I don't know if I have anything more to add really. But we have read your brief, so it really isn't helpful to just parrot what you've already told us.

I sometimes have questions, sometimes don't, but I still want to hear from counsel as to whether there's anything new or anything that now they've given it a second thought that maybe they want to emphasize more than what they did in the brief, and sometimes that leads to a dialogue that leads to more questions that maybe I haven't thought of. Go ahead.

JUDGE STEPHENS: And, you know, we're not a jury, but we're not dead, so a little, you know, presentational style is good. Advocacy, not just a monotone. Engagement.

MS. SWANSON: Judge Gleicher?

JUDGE GLEICHER: I have nothing to add.

MS. SWANSON: So I guess where I'm going with this -- oh, and Justice Bernstein, yes.

JUSTICE BERNSTEIN: No, no problem. Just that they keep things simple. Like I really -- and that's the blessing of being blind is that, you know, oral argument for me actually has a very strong impact because, you know, I enjoy the communication. I enjoy hearing people. I enjoy listening to people. I feel that what oral argument does is allows for the case to come alive.

You know, people aren't paper people, and what happens in oral argument is that it really is the time for advocacy. It really is the time to have the passion and the energy and the enthusiasm for your cause and for your belief.

But the thing that I focus on when I go into oral argument is I have to memorize and internalize all the cases, so, you know, I don't have the luxury of having material in front of me. I have to memorize everything. So the way I value oral argument, and I find it incredibly valuable, is it goes beyond what I'm reading about in the briefs.

And what a oral argument really is, as far as I'm concerned, is it's not a time -- this is just me, my belief. It's not a time to argue with a lawyer.

It's not a time to go back and forth. I view oral argument as one simple thing that is absolutely critical and absolutely fundamental. It's a time for me

to be able to get more information, and that's really all it is.

I use oral argument the way that I really believe that it's intended, which is the fact that I'm asking questions, not to prove a point, not to have an argument, not to do any of those things. I'm asking questions for a simple basic reason. I simply want to learn, I want to understand.

And I go back to what I said in the beginning. All I want is to get as much information as possible. That is what oral arguments is about because it's the one time that allows for a judge to truly do that with the litigants and the participants.

MS. SWANSON: Thank you. So assuming that -

JUDGE BOONSTRA: Can I add one more thing?

MS. SWANSON: Yes, you sure can.

JUDGE BOONSTRA: Because I think that's very interesting, but I would caution you, please, if you have a killer point or a killer argument, don't save it for oral argument because it's going to create, you know, good theater or whatever because --

JUSTICE BERNSTEIN: Right.

JUDGE BOONSTRA: -- as I think we've alluded to, we've been working on your cases for a month before you're there for argument, right? And if you've got something important to say, say it in your brief because that's going to frame our impression of the case and maybe the draft opinion that we might already have on the books.

JUSTICE BERNSTEIN: And it will seek to allow for us to ask more questions, and that's the idea.

Yeah, don't hide anything, don't save anything for orals. Bring it all in the documents, bring it all in the briefs, but then the oral argument allows for us to expand upon what's in the brief to get the information that is presented in the brief but allows for you to express it in greater detail.

MS. SWANSON: And I think all of the lawyers here would be very pleased and happy to be able to target their presentation to your questions and concerns, which leads

me to ask, is there any reason -- it appears that, you know, in the Supreme Court you might even start before that, but at least in the Court of Appeals you've had 30 days before oral argument that you've been working this case up, and would it be possible to have a system where the court, the panel, could communicate to the lawyers, "Here are our questions, here are our concerns, these are the things we want you to be prepared to address."

And I'm wondering what the pros and the cons might be of that and whether that might be something that the court would be willing to consider in order to make it possible for us to be more effective advocates when we're going through our file trying to figure out what we should be keying in on. And you might say, "Well, you should know what you're going to key on," but we don't always know what's on your mind. So Judge Boonstra?

JUDGE BOONSTRA: Yeah, I guess I have two responses to that. And I appreciate why you ask the question. If I was still in your shoes, I'd probably think the same thing. But from where I sit, I guess I have a practical concern and a more substantive concern.

Practically, yeah, we have 30 days and we have 30 cases, right? And we may start working on the cases 30 days before, but we've got to get through 30 cases, and we've usually not -- we might have some dialogue

amongst the three of us, but not that much frankly, so we're not really in a position I don't think, the way things are done today, to put the -- first of all, to absorb everything about all the cases and time to give you our questions, and second, to confer amongst ourselves. We might have different questions. So I had that practical concern.

And a more substantive concern is I may have -- I may have some questions in mind going into oral argument, but as I think I alluded to earlier, I think it's most effective and most enjoyable actually when we have a dialogue. And sometimes a question will prompt a response that prompts another question that I never thought of before, and I can't -- I can't give you all of that because it's done on the fly, right?

And I guess the other thing is, yeah, I guess I would hope that the lawyers are advocates, they should know the case backwards and forwards to be able to answer any question that is asked, but I don't -- I'd like to have the ability to have a dialogue that will help to frame the questions as we go along.

JUDGE STEPHENS: In rare occasions we'll ask for an additional briefing. I mean, if we're reading a case and I call up Lisa and I go, "Wow, this made me really think about this, but nobody really talked about it," you know, we have the opportunity to do that and to give you a

reasonable period of time to answer that question, address that question regarding the case that you're just getting back to. Because you actually have other clients. That's what I heard.

MS. SWANSON: Right.

JUDGE STEPHENS: Okay.

JUDGE BOONSTRA: I also don't really want it to be -- you know, if I was in practice and I wanted to ask some questions, and it's not a deposition, I'd put it in an interrogatory. Then I get a scripted answer. I don't want a scripted answer. I want a free-flowing back and forth that will help me understand the case.

MS. SWANSON: Judge Letica?

JUDGE LETICA: I'm just agreeing. I want the honest answer. That's what -- and I want to see your reaction to the question, your honest reaction, and hear your honest answer and not your answer that you spent, you know, 25 minutes picking a particular word because now you've covered it, you've protected yourself. So that's my take on it.

MS. SWANSON: Judge Gleicher?

JUDGE GLEICHER: I agree with everything that's been said.

MS. SWANSON: Justice Bernstein?

JUSTICE BERNSTEIN: I would say at the Supreme Court we really put a lot of energy, time, and effort into

the order language, and I realize -- I understand and appreciate and empathize with your concern. But I will say is that we really make an effort when we send out order language to try to incorporate some of these concerns and some of these issues to focus the parties' arguments because ultimately that works out better for everyone. The more focused the arguments are, the better it is.

So I'm sure could we do better with that. I mean, you know, we can try to work on it. But I will tell you that, you know, in our court we really do take that seriously, and before order language goes out, there's a lot of debate and discussion on a very intense level about what the order language is going to say, especially on cases with a number of complicated issues.

So we do hear your concerns, we do appreciate your concerns, we do understand your concerns. We're doing the best that we can, and maybe we can have further conversations about it. But I do want to emphasize, we don't just -- we try not to send out just general order language. We do send it out, you know, on several cases. Not many cases because the cases kind of, you know, are applicable to that. But per your question, on certain types of cases when we can, we will send out more specialized language.

MS. SWANSON: Thank you. Mary, are there any questions?

MS. MASSARON: One question which relates to -- two questions. The first one is a technical question. Why does the Court of Appeals have a 250-page-per-volume limit for the appendix and 25 megabytes? If you can fit it in 25 megabytes but it's more pages, is that acceptable?

JUDGE GLEICHER: I think if you asked to break those rules, your motion will be freely -- liberally granted.

JUDGE STEPHENS: Thank you, Ben Fike.

MS. MASSARON: Okay. The other question is a more general question. There was discussion about the writing assignment and the complicated different systems of assigning writing in the Court of Appeals. My question is, when you get your assignments for panels that you are on, how does your preparation for oral argument differ if you have writing assignment or you don't have writing assignment?

JUDGE STEPHENS: If you have the writing assignment, you've got to get that case done earlier so you've sent it to your colleagues so they can look at it, so -

JUDGE GLEICHER: But in terms of preparation for oral argument?

JUDGE STEPHENS: But prep? No, no difference.

JUDGE GLEICHER: It doesn't make any difference.

MS. SWANSON: Well, we'd like to thank all of our panel members. We really appreciate your input and participation. Thank you so much.

(Applause)

MS. SWANSON: That concludes our plenary. Thank you all for being here.

(At 5:42 p.m., plenary session concluded)

VI. Plenary – Technology and the Record

MICHIGAN APPELLATE BENCH BAR CONFERENCE
March 29, 2019

9:16 a.m.

The Inn at St. John's Conference Center
44045 5 Mile Road Plymouth, Michigan 48170

TECHNOLOGY AND THE RECORD

MODERATORS:

Ms. Barbara H. Goldman

PANELISTS:

Mr. Scott Bassett
Mr. Stuart Friedman
Judge Jane Beckering
Mr. Jerome Zimmer, Jr.

REPORTED BY:

Ms. Leah M. Witt, CSR-8825
Certified Shorthand Reporter
(248)644-8888

MS. MASSARON: Good morning. It's great to see everybody back this morning for the rest of our program, which I think is going to be very, very exciting. We have first this panel, then breakout sessions again. Then we'll have lunch, and the judges and justices again will be out at various tables to be available for us to enjoy chatting with in these less formal surroundings than in court. And then we'll end with our Supreme Court plenary panel, which will be very exciting.

So I just want to welcome you, and then I'm going to turn the program over to Barb Goldman, who's going to moderate this session.

MS. GOLDMAN: Thank you, Mary. Good morning, and thank you for being here. When Sergeant Friday on Dragnet would ask a witness to give him "just the facts, ma'am," he probably wasn't thinking about it, but he was beginning the process of creating the record in the case.

Today we'll be looking at what I call Beyond Paper: Technology and the Record. Sometimes I feel like Eliza Doolittle who said of words, "There isn't one I haven't heard." As lawyers, words are our stock and trade. As appellate lawyers, we rely on writing to preserve the words that make up the record that we will work with on appeal.

For generations the record has been a paper transcript. Who among us does not have drawers and boxes of transcript volumes, or for some of us, the equivalent of electronic files, full of words. As technology has altered other aspects of the practice of law, so too it is creating change in what makes up the record of a case. Today we'll examine some aspects of adding non-textual elements to the record.

Our panelists are Scott Bassett, whose practice is in family law and who flew up from Florida where he manages to practice law long distance; Stuart Friedman, a criminal defense attorney who's always on the forefront of legal technology; Judge Jane Beckering from the Grand Rapids office of the Court of Appeals; and Chief Clerk of the Court of Appeals, Jerry Zimmer.

So we'll start off with our audience polling questions, Scott will take over, and then each of the panelists will make a brief presentation. I have a few questions for them, and then we will have time for questions from the audience.

There should be index cards on the tables. So with that, I'll let Scott take over the audience.

MR. BASSETT: Okay. We have a microphone here? Okay. Yes. Well, you're going to be using your apps. Just for a reminder, this is where you go. It's up on screen. And then you go down to the Live Polls at the

bottom, and then I'm going to go through the questions one by one. So here they are.

Okay. Everybody's already voting. This is just to identify who we've got here as to what their primary field of practice is. As you can see, we've got roughly a tie between primarily criminal and primarily civil.

A few of us domestic relations practitioners here too. And then we've got primarily child protection. You know, it's ironic you bring somebody up from Florida to do your polling, right?

The next one is, which of the following types of non-textual content have you embedded into a brief or a pleading in the Court of Appeals or the Supreme Court? For more than a third of you, it looks like it's none, you've never done it, and those that have -- and I might add, you're only allowed to vote for one. There aren't multiple votes.

Charts, maps, and diagrams are the most common, which makes sense. We're often compiling what can be complex financial or other evidence into charts or tables in our briefs for ease of reading, even if that chart or table was not actually an exhibit admitted at trial.

Next, whether you've ever seen any of these things in a brief. Not that you've written, but that you've received from opposing counsel or happened to

review for co-counsel. And, again, none is down at 15 percent, so even those of you who haven't done it have at least seen it. And, again, the leading type of non-text content is a chart, a table, or diagram followed by photographs.

And next your opinion. Do you think non-text materials in pleadings are more likely to be useful, distracting, or have no effect? A significant majority thinks that those are useful, 9 percent distracting, and of no effect, 4 percent.

Should we have rules that deal with non-text elements in briefs, motions, and other documents to be filed with the court? 43 percent of you prefer Wild West. You'd rather ask for forgiveness than permission. But a majority of you do think there should be some rules in this area. All right. Thank you for voting.

MS. GOLDMAN: So, Scott, if you'd like to make a few remarks.

MR. BASSETT: Yes. What's interesting is, as the technology has progressed in our brief writing, we have the ability to put a lot of non-text elements into our briefs.

Michigan does have, of course, page limits on briefs, which is a significant disincentive to using non-text elements knowing that it's going to be at a cost in terms of the amount of text that you can put in. It's an

interesting dilemma. If you do think that a picture is worth a thousand words, you may literally have to give up a thousand words to get that picture in, and that can be a problem.

The obvious solution is to go to a word-based limit like we have in federal court for the length of briefs because page limits encourage all kinds of bad decisions such as omitting non-text elements from your brief. Also, there is the tendency to want to use the tiniest, most illegible font when you file your brief as you approach your 50-page limit and to not effectively use white space, which research tells us is essential to be able to comfortably read and understand what you're reading.

So the 57 percent of you who thought there should be some rules governing these non-text elements were probably correct.

MS. GOLDMAN: Stuart?

MR. FRIEDMAN: I largely agree with what Scott said. Going to the very seminars about how to do better trials, you're being told to put more multimedia in, to present it to the jury to appeal to their visual senses as well as their auditory ones.

And as you're presenting a trial that's in that fashion, taking only the audio track of the video of the

trial basically and taking it on appeal seems like the Court of Appeals is often getting half the picture.

As we're dealing with those technologies below, I think we need to deal with them above. I think as we're processing more data, it makes a lot more sense. And law moves in small steps. We are more hesitant than most professions to move that way, but I think we must.

I have certainly embedded all of the things that people have talked about, except for video because basically it's impossible to get it within 25 megabytes and make it work. And mandatory e-filing has only become a recent thing in Michigan, at least the ability to file it whether your opponent wants to receive it that way or not.

Before then, if I would have put high color scans into a brief, videos into a brief, et cetera, and then mail a printout to my opponent, opposing counsel, there would just be something unfair about that, so I refrain from doing it.

MS. GOLDMAN: Judge Beckering?

JUDGE BECKERING: So our court is dealing with -- I would say there's five implications when it comes to non-text materials in the appellate world. The first is the quantity. It's going up. Everywhere you go there are video surveillance cameras. People have their

phones, they can take pictures, they can take video. There's more and more evidence. It's evidence that's coming into play in our legal realm, so we're dealing with that. We're dealing how to effectively present that to the court, to the trial court. So that's one thing. Quantity is up.

Two, availability is a challenge. What I mean by that is however that data is being recorded, if it's a video, it's having -- we're having issues twofold. Physical possession. I can tell you probably every single month I get a case where the briefs are discussing evidence that I don't have accessible to me. It hasn't been produced in the trial court record. We have to do a record request for it. There are delays getting it from the record request.

And I've talked to our prehearing supervisors who say the exact same thing is happening in the prehearing department, and so that prehearing attorney who's writing up a report will request it, they'll set that case aside, they'll wait, they'll work on other projects, it will come in, they'll finish this project, and they'll go back to your project if they've gotten that document, and now they're trying to remember what the case was about. And I know it's frustrating for you because I know trial courts aren't always accepting these materials, which is going to get to my last point.

Three, we're having major compatibility issues. There are pieces of evidence we have to look at. If it's a motion to suppress and we have to view the evidence as to determine whether or not there's sufficient evidence or whatever it was, I can't play on my computer. I send it to my law clerk. She can't play it on her computer. We send it to IT. They can't play it on the computer. They call the prosecutor's office, and the prosecutor is saying, "I'm watching it right now." But we can't.

So we have a travel lab tech because we don't want viruses and we're trying to get it to play a video right now, and it's taken three weeks and we still can't get it to play and we're still working on it. So to the extent that we can work together to find some clearing house to get that, it's just better that everything is fresh and playable. So that's a compatibility problem.

Fourth, there are implications on the standard of review. A photo is a photo, and when we all look at the photo, it's indisputable what the photograph shows. Video has implications. Are we going to weigh in on credibility? Are we going to weigh in on whether the person was nervous or not?

I mean, there's the *Kavanaugh* case out there, there's the *White* case out there. There's several cases that address this, and we need to talk about that. What does that mean? Do we reweigh evidence, or do we just

look at indisputable facts? The video is obvious. The defendant was in the court with shackles. We see them.

And, finally, my comment is the golden rule. We really need to see what you're talking about. So if you cite it, attach it. You can embed it in your brief, and that's great. When used sparingly, that's really helpful. But at a minimum, put it at the end of your brief.

Most of us now are reading electronically. We all have iPads. We can just very quickly tap the exhibits page and find that document, and that really fulfills your argument that we're able to see exactly what you're talking about. Those are my remarks.

MS. GOLDMAN: Jerry?

MR. ZIMMER: Yeah, I think that from the administrative side of the court, we've been probably for almost 20 years dealing with the slow transition of technology away from paper to the electronic world. You know, in 2001 or '02 we started scanning documents internally and we put our stuff out on the website, and in 2005 or so we started e-filing. 2009 or '10 we started getting electronic records from the trial courts.

And all those projects have gone forward and progressed to the point where I think we're at -- e-records, we're probably getting almost 50 percent of our cases by e-record now. Most of our filings I would say about 75 percent, especially from attorneys it might be

80-plus percent that are e-filed, the documents we get are e-filed. So it is turning into a, more or less, paperless world.

We were at a conference a few years ago, and a judge there joked, you know, that courts will become paperless when bathrooms become paperless. And so there will always be the paper, but we won't move it I guess is the difference. We won't move it from place to place. It will always either be available to the end user from what they're looking at, or we will send it to somebody.

You know, and so in doing that, I guess we've run into some challenges in making that transition -- well, we've run into a lot of challenges, but with regard to this topic, you know, the non-text material that we get, it generally takes the form of, like the judge was saying, DVDs or USB drives that come in with briefs or come in with a record, and we have difficulty playing them.

Because as far as I understand it, the videos can be taken on all manner of media or systems that require different players and what have you, and so I guess the advice would be, you know, at least on that narrow topic, when you are doing that, you know, when you're attaching a DVD or a USB drive, first of all, label it because that -- you know, they usually come in

an envelope, and so in order to play them, we have to take them out of the envelope.

If there's no labeling on that CD or DVD or the USB, that can get separated from the file and later you're like trying to fit it back to the case it goes to. So if you can label them, try to identify exactly what that video is, why does somebody want to look at it. Also, if the disc or the USB contain multiple files, is it just one of the files that you want to look at?

We recently had a case -- a DVD that had over 200 very short video clips on it with a listing of, you know, just file names, nondescriptive file names. And if somebody -- and apparently only a few of those videos were usable or relevant to the case, and, you know, so we were tasked with -- or the research of the judicial offices would have been tasked with going through those files and trying to figure out which one applied to the case. So I guess that would be another tip, that if you have multiple files on the disc, please identify what you think or which file on that disc should be looked at.

And then most importantly, we have difficulty with the compatibility. The players don't work on our system often, and so we often have to go back to the attorney, "Give us another version of that." One thing you can do is include on your DVD or USB drive the -- I'm

not sure what you call it, but the player, the player file that would play that video.

And, you know, if we have that, the other thing to do is maybe put together some instructions maybe on the envelope that you put that in or whatever. How do we open this, you know? Give us some step by step what we need to do because the people who are looking at this may not be tech friendly, so if you tell them, you know, open the media player first and then go to the file, et cetera. If you can help us that way, that would be great.

Also, if you can put the files in an MP4 format or an AVI format -- I think those are the names -- we can play those universally. So I guess those would be my tips for the non-text material as far as we get them today.

MR. BASSETT: Can I add something?

MS. GOLDMAN: Certainly.

MR. BASSETT: Jerry, do you know how long it will be before we have the ability to, instead of filing physical media, to be able to upload through the e-filing system or some related system these kinds of non-text materials like video, audio?

MR. ZIMMER: I don't know that. You know, you might -- I don't know. I haven't heard that in our e-filing discussions that, you know, getting to that point yet, so I don't know.

MR. FRIEDMAN: Can I ask a follow-up, which is we have an EXE file on a USB and then we send it to the Court of Appeals, will that USB have to be used in a clean machine rather than the one in chambers out of fears of virus? That's why I haven't done it.

MR. ZIMMER: I'm told that we can generally use the USB on our own equipment, that we have virus software that will scan those things or protect our system is how I understand it.

MS. GOLDMAN: We resolved the technical issues? Then I'll direct my first question I think to Stuart simply because it's in the criminal context that the court -- at least our courts have had to consider this. How is the availability of audio and visual recordings affecting the appellate side of criminal practice, particularly in light of the Kavanaugh opinion?

MR. FRIEDMAN: I think that it's pretty much a game changer because it used to be our client's word versus the police officer's word on issues like search and seizures, confessions, et cetera, and as a practical matter, the police had more chips on their side in the credibility pot.

We've seen in a number of cases where the video has contradicted what the officer has said, and I think there's an increasing willingness on the Court of Appeals

to take a hard look at the video and to give greater deference to what the video says than how a person reports it.

I mean, some of it may be shading the testimony on an illegal search. Some of it may be that if it's a gun that you seized in the city of Detroit eight months ago out of a car, from the perspective of an officer, your memory may blur together with all the other similar cases you've had in the intervening time period.

I think that Kavanaugh, at least unless the Supreme Court modifies it, which they declined to do when the case went up there, opens the door for the appellate court to give greater -- I don't want to use the word *de novo*, but to give less deference to the trial court's viewing of a video that they're equally capable of viewing.

MS. GOLDMAN: And I'll direct a similar question to Scott on the civil side.

MR. BASSETT: Yeah, on the civil side, which I'm going to include family cases within that since that's what I know best, but in general what we see is not just the type of video that, was a factor in *People versus Kavanaugh*, but also other forms of direct evidence.

And what we see often in civil cases and in domestic cases are text messages. In addition to sometimes we have video as well. Since everybody has a high resolution video camera with them at all times, there's almost nothing that happens on earth that isn't recorded on video. You just have to find where it is, whether it's a building security camera or somebody walking by with their cell phone camera taking video.

People text message frequently in ways that is extremely relevant to an issue in whatever civil or domestic matter that they have, and often those texts are directly contrary to their interests. We see text messages being produced, and these are the statements of the participants in the litigation or important witnesses.

As in the situation of the video of the police stop in Kavanaugh, is this another situation where there's no reason to afford the trial court a great deal of deference in reviewing those text messages? They say what they say. I mean, again, assuming you've demonstrated that they haven't been altered, just as you had to do in the Kavanaugh case. There was no dispute there. Everybody agreed that the video was an accurate representation of what actually happened, so that had not been doctored. So with direct evidence where it's really not a question of interpretation anymore, it's a question of looking at it and seeing it.

When People versus Kavanaugh came out in the summer of 2017 I think, it was immediately obvious that this was something interesting. Stuart just said groundbreaking or earthshattering, whatever term you used, and we kind of felt the same way. John Ceci's over there. He and I do a weekly podcast called Guys with Mics, and we've talked about the case on multiple occasions, following it because we knew this case is going to the Michigan Supreme Court. It was easy to predict as soon as the Court of Appeals issued its decision.

So the question is, is this really a change in the standard of review, or does it just make it easier to find clear error when you're able to observe it? Does anybody think the Supreme Court punted on this for exactly that reason? Is this too big a can of worms to try to open? I don't know.

MS. GOLDMAN: And, Judge Beckering, you referred to the issue of the standard of review. That's pretty much the most salient thing among practitioners, particularly in light of the longstanding deference to the trial court on issues of credibility. Perhaps you'd like to comment.

JUDGE BECKERING: I would say I think Scott just pointed out the idea that if it's something that's beyond dispute, that the video is like a photograph and

we can all see what's in it, not just in terms of that it covers the entire thing, but it's an accurate depiction.

If there are issues about whether the video covered the entire police stop or the right angle isn't there or the lighting is not good or there's something else that creates a greater demand on the trial court to weigh issues of credibility that the video doesn't completely cover, I think that's an area where our jurisprudence has to analyze how far do we go?

And this is a national issue as electronic evidence becomes more popular. It's a dialogue at a national level. And the Indiana Supreme Court has weighed in on their own standard of review for video evidence, and they still defer to the trial court unless that video evidence is indisputably mistaken, right, from the testimony of the police officer. So it really is -- as Scott said, it's a clear error analysis.

But there are other aspects of how far do we go, nervousness, whatever it may be where we really -- do we want to begin the process of the appellate court reweighing credibility? Do we really want that shift away from the finder of fact at the trial court level to the appellate level? And I think that's where we're kind of on new ground in a lot of ways, and Kavanaugh was the

first real entree into that, and I think that's yet to be resolved.

MS. GOLDMAN: And I would mention, we included several law review -- well, two law review articles in the materials for this session which talked about some of these issues if you would like to see some additional consideration of them. I think I'd direct a question to, well, most of the practitioners and to the judge.

What ethical and practical issues are raised by the existence of video trial records? Should an appellate attorney -- since most of us are appellate attorneys, we're not the trial attorneys -- be expected to watch or listen to the entire proceeding regardless of how much you'd either have to charge the client or expend on your own? Perhaps we'll start with Stuart.

MR. FRIEDMAN: I don't think we need to do that. First of all, I've written about three motions for a new trial in my career where I've had to work from the video just because the transcripts are not available. It is painful, it is realtime, and your client will be paying way more than they ever believed as you are sitting there rewinding the video three times to figure out what people are saying and everything at the same speed as the original trial.

That said, when you read the trial, there are sometimes things that are going to set off your radar.

You're going to see things where you've got a sense I'm not getting the full picture, and in that case sometimes you do. And, of course, in most cases where trial counsel's cooperative, you've debriefed him or her and they've told you things that have set off their radar. I'm sure there's going to be some things that your clients will tell you as well that will warrant it, so I think you need to go at it selectively.

The other thing I'm going to say, though, is that it's sometimes very difficult to get those video discs. Many courts require you to view them in the courthouse or you need to file a motion to get them from the court. I've won those motions, but I've had to go in there and articulate a good reason and make my point from there. If you look at the criminal breakouts, I actually included a sample of one of those motions that people are free to borrow.

MR. BASSETT: Stuart, isn't Oakland County is one of the counties where you have to go in and view, you can't actually buy a video? I think that's correct, right?

MR. FRIEDMAN: That is correct, but I've seen unpublished orders where they have allowed counsel to get it. And I don't think the rule has the escape clause that allows the judge to do it, but I've seen SADO in particular get three or four different orders where they've gotten it. So if you think it's important, fight for it.

MR. BASSETT: Stuart mentioned that what you learn from your clients -- in my cases I'm never both their trial counsel and the appellate counsel since I don't do any trial court work and I have to rely upon what my client or trial counsel tells me. And sometimes, I'll get the transcript and they will have told me the judge was dismissive, the judge turned his or her back on me or my witnesses when they were testifying or smirked, rolled eyes, nodded off. None of that, of course, shows up in the transcript.

And so I read that and I think, okay, we've got no basis, when somebody's dissatisfied in a domestic relations matter, the first thing they want to do is on appeal ask for a new trial judge, which is, something that I almost never ask for and the court almost never grants, which is probably a good thing.

But, you have to satisfy your client. We serve multiple masters as advocates. We've got to serve our client's wishes, we've got to do what we have to do for the standard of care for our malpractice carriers, we have

to obviously structure arguments that are going to impress the panel on the appellate court. So we've got all these things we have to balance, but we also have to not bankrupt our clients trying to do it.

If your client tells you that there's something going on with the way this case was handled that's only going to be on video or if trial counsel tells you that, then it may well be within the standard of care that you've got to watch the video, as painful as that is.

I just finished one, a case from up in Marquette where I had to watch the video, and it was painful to watch. When you're used to just reading transcripts, it just clicks right along. The video is ten times longer than it would take to read the transcript. But if the client is convinced or trial counsel is convinced that there is something relevant on that video that you may need to argue on appeal, then I think you've got to do it.

MS. GOLDMAN: Judge Beckering?

JUDGE BECKERING: Do you want me to weigh in on that?

MS. GOLDMAN: Yes, please.

JUDGE BECKERING: It's up to you as lawyers.

JUDGE BECKERING: Well, I agree to the extent, as Scott said. That is an issue is whether or not you have to start watching the entire trial on video, and I don't

think that makes any sense unless there's something in there that is a piece of evidence in and of itself.

For example, if the trial court made prejudicial comments that were dilatory to a defendant and the question is was the jury in or out of the courtroom, well, you're going to go back and you're going to look at that video. So I think that's a matter of discretion by the trial judge or the appellate judge.

MS. GOLDMAN: Jerry, do you have anything on that point?

MR. ZIMMER: No, not really. I mean, it doesn't really affect the administrative side of the court.

MS. GOLDMAN: Want to make sure we covered all the bases.

MR. ZIMMER: Yeah.

MS. GOLDMAN: So I suppose this would probably be directed first to Judge Beckering simply because she's the one who's confronted with most of this, but anybody. One of the things that's different about visual -- well, certainly video and, to a lesser degree, audio recordings is you can control the speed, you can stop them, you can look again, which obviously you can't do during a live trial proceeding. Does that have implications for appellate review?

JUDGE BECKERING: In what context?

MS. GOLDMAN: Well, the most salient issue to most of us seems to be witness credibility, but really in any situation. If you have something that was a three-second clip, a video, which can be reviewed many times, that's different from hearing a witness describe it.

JUDGE BECKERING: Well, I think we as an appellate court have to be careful about second guessing findings of fact and reweighing issues of credibility, and so to the extent that we're diving down into a video of a witness testifying, I think we're still bound by a clear error standard. So I don't know that I'm comfortable at this point reviewing testimony and slowing it down to question the credibility.

Technology's great and it's gotten really incredible. We've contemplated whether or not video testimony is good enough for sentencing if you have someone by video, and what did we conclude? Not yet, no. That in-person evaluation is so much more meaningful. Whether we agree with the stereotypes of what makes a person credible or non-credible, I would be reluctant to start stepping into the shoes of a trial court judge and making those decisions based on a video for a long time, despite the advances of technology.

MR. BASSETT: Aren't we overestimating the ability of people who aren't trained in psychology or psychiatry such as judges?

JUDGE BECKERING: How about jurors?

MR. BASSETT: Or jurors.

JUDGE BECKERING: Isn't that the people who are doing it?

MR. BASSETT: Well, not in my cases. But aren't we giving them too much credit for being able to assess credibility through demeanor? People come in so many different varieties in the way that they interact with the world and with other people, that just because somebody exhibits characteristics that we might think suggests a lack of veracity, a lack of trustworthiness, doesn't necessarily mean that they are.

And is there really any core justification from a scientific perspective for this tendency throughout history to defer to the trial court's credibility determinations. I think that's still an open question, and have we been going down the wrong path all along?

We always have this tension, and it's really the tension here between speed and finality and getting a matter resolved versus accuracy, and have we been leaning too much on the side of speed and finality and not enough on the side of accuracy?

MS. GOLDMAN: Stuart?

MR. FRIEDMAN: Couple points. First, most of the time when I'm rewinding and rewinding, it's because I'm having problems hearing or I'm trying to see something that is not as well captured as it was in person. I mean, it's trying to figure out whether the word (sic) used the word puck or something else.

Secondly, I'd like to read out loud the rule on clearly erroneous because I think that people forget the second sentence. Findings of fact by the trial court may not be set aside unless clearly erroneous. In the application of this principle, regard shall be given to the special opportunity of the judge to judge the credibility of the witness who appeared before it.

So if there isn't a witness before it, textually I'm not really sure that it totally applies. And more importantly, if you juxtapose it with Federal Rule of Civil Procedure 52(a) where they dropped that language, I think that's significant. They dropped it in 1985. Before that, you had a body of law that said in federal court that we don't apply clearly erroneous where the federal court doesn't have that.

Where do we see it mostly? Written instruments. The trial court's ability to read a written contract was no greater than the appellate court's, and they said they didn't defer, a number of courts did say that. On the written word they didn't give that deference, so I think

that may be the better analogy, and the fact that we didn't follow the feds here I think is significant. So in that regard, I do differ a little bit with some of the other people who have commented on this.

MS. GOLDMAN: Any additional comments, Judge?

JUDGE BECKERING: No, thank you.

MS. GOLDMAN: Well, then, let's perhaps look at the other end of the process, producing the opinion. One of the issues that was raised in some materials I've seen was whether an appellate court in producing an opinion should ever create its own images, or perhaps I should broaden that and say make use of images. One does see that from time to time.

One of the side issues is that if you do your research electronically and you're using West, you'll see "non-textual material omitted," so you have no idea what it actually was. But perhaps we have comments from the practitioners and the judge?

JUDGE BECKERING: I'm guilty. I've done that before. I didn't know it wasn't showing up.

MS. GOLDMAN: Within the opinion that comes out from the court it would be there, but when West reproduces it, at least as of now they don't have the capacity to do it. I read a very interesting law review article that said, "And look at this image, non-textual image not reported."

JUDGE BECKERING: Well, I think the reason that our court may do it in opinions, and I think it's relatively infrequent, is because, as Scott has said, a picture can be worth a thousand words, and if you're trying to deal with whether or not someone has adversely possessed a property and you're trying to describe where the fences are or aren't or where the obstructions are, just having a picture of that can be so clear. Just like in your briefs you might just be describing something to us, but to have that picture is really helpful.

So we do it rarely because we're making issues of law, we're not making findings of fact, so in the rare circumstance we put it in there, I think it's because we think it's helpful to the opinion. But I don't think it's crucial.

MS. GOLDMAN: Practitioners?

MR. BASSETT: We live in this multimedia world where so much communication happens in ways that are non-textual. It probably makes sense for all of us as lawyers and for the courts as years go by and as millennials start ruling the world instead of us aging baby boomers, we need to recognize that there will be different means of communication, and having the courts employ images and other items and conveying the meaning of their opinion. I think that would be important just as lawyers need to use that in conveying their meaning to the courts.

I've been toying with maybe not an all emoji brief, but at least a paragraph or two in emojis to see if they tell the story appropriately. I'm waiting for the right case. But it will happen.

MS. GOLDMAN: Stuart?

MR. FRIEDMAN: I've certainly seen it and I think it can be effective, and Justice Scalia did it in *Scott versus Harris*, releasing the video, which was the settling of the dispute on a qualified immunity issue. And I also remember Judge O'Connell's opinion in the *People versus Redden* on medical marijuana where he posted all the signs around town of doctors who were offering cheap and dubious certificates to patients to prove his point about the abuses of the law.

MS. GOLDMAN: Judge or Jerry?

MR. ZIMMER: I would just say that, you know, echoing what Judge Beckering said, it's very rare. I mean, the clerk's office puts out the opinions, so we see them. I mean, it's very rare that they have anything other than text.

MS. GOLDMAN: Well, perhaps let me ask a question that may not have an answer, but I was curious about. Suppose there was a dispute about whether something was preserved, particularly during a trial when, you know, things are running hot. Could one rely on a video or perhaps a audio recording for an item that didn't make it

into the transcript, either because it wasn't audible enough to be transcribed or for some other reason, and argue that the matter had been preserved?

JUDGE BECKERING: You're asking whether you can use video evidence of the trial to show something that wasn't in the record but it shows up on the video?

MS. GOLDMAN: More or less, yes.

JUDGE BECKERING: I would say yes. You'd move to expand the record and call it non-testimonial evidence.

MS. GOLDMAN: That's good to know.

JUDGE BECKERING: I think it's the discretion of the panel, but I would say that that is valuable evidence.

MS. GOLDMAN: Practitioners?

MR. FRIEDMAN: I think you could move to correct the transcript as well. You have a right to an accurate transcript. If I've said it, court is in session, I'm on the record, and the court reporter doesn't transcribe it, that's an error on the part of the court reporter, and the Court of Appeals has said that you do have the right to correct the transcript. You need to have a rather strong proffer, but a video showing it is about as strong as you can get.

And I remember many years ago I reversed a first degree murder case, and the defective word in the judge's murder instruction was he said there had to be a "casual

connection" between the defendant's actions and the cause of death. And, of course, the prosecutor argued that the word was "causal," which would have been appropriate rather than casual, but the court reporter swore up and down the judge said casual, so at that point the Court of Appeals had to reverse.

MR. BASSETT: This is all the more reason why it may be the standard of care to have to review video because you often can't rely on the transcript being accurate, especially if the client or trial counsel who was there says, "I don't think it happened that way."

I'm working on a case now where my client swore that there was a whole section of his ex-wife's testimony that was missing from the transcript, and we wouldn't have known that unless we reviewed the video and were able to confirm it.

And then fortunately we were early on in the case, so we didn't have to do a motion to extend the time to order transcript or correct the transcript. We were able to get with the court reporter who reviewed the video and said, "Oh, yeah, I missed 30 minutes here." We're not sure how that happens, but it does.

If you've got input from your trial counsel or your client that there's something in the video that may be relevant, it's your duty to review it, as painful as it may be.

MS. GOLDMAN: Well, I have a few questions from the audience. Let me perhaps paraphrase this and address it to anyone who'd care to answer. Are you advocating a bifurcated standard of review between factual findings based on testimony and factual findings based on video evidence?

JUDGE BECKERING: I'm not. I think there's just a difference between the clear error standard of review with the type of evidence that's deemed to be similar to a photograph that it is apparent by any viewer what it does or does not show versus reweighing evidence when it comes to credibility.

There's a Virginia Law Review article that came out in 2010 called "Deference in a Digital Age: The Video Record and Appellate Review." That's an excellent discussion of all aspects of video evidence, whether it's from the trial testimony or other evidence of how it's used and how -- the way in which we use that.

So I don't know that bifurcated. I think it's quantitative. Substantively why are we looking at this video and what are we looking at? And does it speak for itself? Is it factual evidence that's clear and undisputed, or is there some weighing of credibility in the bigger picture? It's more than just that video. There's more that goes into it to making a finding of fact. That's a different situation in my opinion.

MS. GOLDMAN: Either.

MR. FRIEDMAN: I don't believe that it's exactly as the person who put it in the question. I think where the trial court has a better connection to the evidence than the appellate court that more deference is appropriate. I mean, cameras are not perfect. They're getting better. As they're getting cheaper, they're in more places.

But in a courtroom, because we do not videotape the jury, anything that happens in that zone around the jury does not appear on video. One of the things that's frustrating is when I watch the closing argument on video and the prosecutor's pointing to an easel, I know it, but I can't see the easel because it's too close to the jury because they're his audience and I'm not.

I was -- one of the things when I was looking at the literature about confessions and the voluntariness of confessions and how video impacts on that fascinated me, which is that if the video is focused on the police interrogator, people are more likely to say that the confession was voluntarily. But if it's focused on the suspect, courts and individuals who are observing it say the opposite, they say it is involuntary. Same confession, different angle.

Is Aaron Mead in this room by any chance?

One thing you said in your oral argument in Kavanaugh in the Supreme Court that impressed me was when you quoted the number of cameras that were at the Super Bowl in response to our argument. I watched it on video, so perhaps I didn't get the full gist of it, but I certainly noticed.

And it's true. I mean, these videos are not what are in a studio, and we've got to be cognizant of it. I've got a Ring doorbell on my front porch, and it shows me what's going on, but it shows it with a fish-eyed perspective and it's distorting. Videos that are taken at night are distorted.

In almost all cases you do have some balancing between credibility and a video. It's very rare that the video is the only evidence against a person. You usually have somebody there as well. So it's how much do you credit the video versus how much do you credit the memory?

So I'm not saying that it's the end-all be-all. I'm just saying that with all we know about eyewitness identification and the frailties of human memory, it's often the better witness.

MR. BASSETT: Right. Video's obviously not infallible. You can go back to when I was a child, and how many times have all of us watched the Zapruder film and yet we still don't know what happened that day in Dallas.

But on the other hand, it's much more likely that the video is going to provide a more accurate picture of what happened than somebody's memory who was there because while we say that a camera only has one angle -- I'm assuming it's a single camera situation. That's not always true.

However, an individual only has one angle as well when looking at it, and then we've got the suggestibility of witnesses, the fading of memories, the inability to perceive. A lot of us are not as good as others at perceiving what's going on in the world around us.

So there is a place for this kind of direct evidence, the video, the photograph, the audio recording. Does that mean that all of those are subject to de novo review instead of clear error? I don't know how to answer that. Or is it just as simple as clear error is easier to find because you've got something that appears to be accurate and immutable, it's not going to change?

Does it really matter whether we call it de novo or just easier to find clear error? I don't know. Maybe in the end you reach the same point. We don't know the answer to that question since the Supreme Court denied leave in Kavanaugh, so it's the next case maybe that's going to tell us what we've got.

MS. GOLDMAN: I think that one of the questions is, should practitioners be arguing about what the proper standard of review is in order to get the law to develop in this area? Anybody?

JUDGE BECKERING: Sure. If we're going to develop this area and video and other evidence is going to be more and more prevalent, we need to kind of push the walls and see where we line up in terms of what our standard of review is for the purpose for which we want that evidence to be reviewed.

MR. BASSETT: In family law circles we've been discussing this issue. Obviously Kavanaugh is a criminal case, but we take a look at how it applies to all of our cases and all the types of direct evidence we see in, for example, a post-judgment dispute in a contested child custody case where you always have parents videoing one another perhaps during the parenting time exchange trying to provoke the other side. We have more tech savvy spouses putting surveillance cameras in the marital home during an pending divorce.

We've got all of these issues and they will be argued, so we're going to be forcing the issue on these and the Court of Appeals will have to decide how to properly review the trial court's perspective of these -- this type of direct evidence. And it doesn't end with the

Supreme Court's denial of leave in Kavanaugh. It's going to go on.

MS. GOLDMAN: Stuart?

MR. FRIEDMAN: I have a couple of points. The first was yesterday during the keynote speaker, the former solicitor general, talking about *Chevron* deference, the deference we give to agency construction of administrative rules, he said -- and I think it's relevant here -- that he didn't think the court was ever formally going to say *Chevron* is overruled, that they were going to use the other tools of statutory construction to say why they thought the agency got it wrong.

Similarly, I think that that's what you're going to see here is that the courts are going to probably still say we review for clear error, but here's what we see and, therefore, there is clear error.

There is inconsistency right now in the way that we're seeing the Court of Appeals process some of these cases. In one of the breakouts yesterday somebody juxtaposed this case with Kavanaugh with an unpublished case called *People v Anthony* where the videotape did not carry the day even though it seemingly contradicted the officer's testimony.

I know that myself I've been on the opposite side of this issue, and I think as advocates we're going to find ourselves on both sides of this issue. I thought long and hard before I filed my brief because my first instinct was that the other side was right.

As a matter of fact, the New Jersey Association of Criminal Defense Lawyers in a called *State v S.S.*, the case out of New Jersey that came before us on this issue, took the opposite point of view. They sided with the Prosecutor Attorneys Association of Michigan and the Berrien County prosecutor, whereas I was siding with the New Jersey Attorney General. I think that tells you something.

As an advocate, our client is obviously on the right side of that, and we're going to be arguing out of both sides of our mouth quite a bit on that. I don't think there's really any way to get over it.

I know that two years earlier when the Court of Appeals didn't think the trial judge judged my videotape right, I was outraged and I thought the trial court of course had a better monitor, better plasma screen, or some other better way to view it. But that's life in the big city.

MR. BASSETT: Those of you who only do defense work or plaintiff's work don't know the joy that we have in domestic relations of sometimes on the same day in front of

the same panel arguing exactly opposite interpretations of the law, especially when we've previously written articles on that where the other side cites it against us. It's a lot of fun. But we're advocates. We speak out of both sides of our mouth when necessary to represent our clients.

MS. GOLDMAN: Well, we're nearing the end of our time here, so I think I'll ask any of the panelists who wish to comment on the truism that seeing is believing and what implications that has for appellate practice. Perhaps left to right.

MR. ZIMMER: Again, that doesn't really go to my area, but given the opportunity to give some closing remarks, I guess I would just reiterate that, when you are giving the court something that is not contained in your brief that can't be, put on paper, whether it's electronic or real paper, that you should, make it easy for us as best you can. We've heard at different points our judges and research people talking about that.

You want to make it as easy for them to rule in your favor as you can. If they have to, as Judge Beckering was saying, go to IS and everything else to try to get your media to play, you've created a problem for them. And whether that affects anything, I don't know, but you want to make it as easy for them as possible.

JUDGE BECKERING: Yeah, seeing is believing. And as I'll just reiterate, to the extent that you can attach those non-text documents to your briefs, because we do still have paper record, we have electronic record, but to the extent that we each get the briefs electronically and that we get that video or photograph or non-text evidence attached to those documents, that really helps us in our review.

MR. FRIEDMAN: One of the stories that I'm going to take to retirement is that in Kavanaugh I cited as authority the Marx Brothers in "Duck Soup" for the quote, "Who are you going to believe, me or your own eyes?" And I really think that says it all. I think video is here. We may slow it down a little bit, but it's a game changer.

MR. BASSETT: It is. Although, like anything else, it can be manipulated. Some of you may be familiar with the term deepfake, and that is a process where artificial intelligence is used to essentially create videos that never existed but look like they're real. I've seen an example of President Obama endorsing Donald Trump for president, which I'm pretty sure was not real, but it looked like him talking and it was his voice.

Because we have so much computing power available to us, we can take speech and pull out the individual words and then put them back together in an order that was never intended and then sync it to video

and hence we have these deepfakes. So you always have to be concerned about manipulation of evidence.

On the other hand, we have to be equally concerned about the fallibility of witness testimony and the fallibility of judges being able to judge credibility just based upon what they see in the limited span of time in the courtroom.

MS. GOLDMAN: Well, thanks to our panel, and I'm sure that there will be opportunities to ask questions informally later.

(At 10:16 a.m., proceedings concluded)

VII. Plenary—Supreme Court Practice Tips

MICHIGAN APPELLATE BENCH BAR CONFERENCE
March 29, 2019

12:47 p.m.

The Inn at St. John's Conference Center
44045 5 Mile Road Plymouth, Michigan 48170
Supreme Court Practice Tips

MODERATORS:

Ms. Mary Massaron

PANELISTS:

Chief Justice Bridget McCormack
Justice Richard Bernstein
Justice David Viviano
Justice Brian Zahra
Justice Stephen Markman
Justice Megan Cavanagh

REPORTED BY:

Ms. Leah M. Witt, CSR-8825
Certified Shorthand Reporter
(248)644-8888

MS. MASSARON: So welcome to our last session of the conference. I want to welcome and thank the justices on our Michigan Supreme Court for their support for the conference and, in particular, for their being here today.

I'm just going to go down the line. You all know them. Justice Bernstein, Justice Viviano, Justice Zahra, Justice Markman, Chief Justice McCormack, and Justice Cavanagh are with us today. Justice Clement would have liked to have been here but had commitments that prevented her from joining us.

So we are very, very happy to talk with the Supreme Court, and we're going to have some questions and answers, focus on some of the theme questions we've had. So first, we'll start off perhaps focusing a little bit about facts, the importance of facts in appellate decision-making, and I thought I'd start with a general question about whether there are certain types of cases in which the facts are the most significant or a more significant focus of your analysis and what those kinds of cases are.

And maybe we'll try to mix it up at various points, but maybe we'll just start with Justice Bernstein and go down the line for this question.

JUSTICE BERNSTEIN: You know what I'm going to do? I am going to defer to our chief.

MS. MASSARON: Okay.

JUSTICE VIVIANO: Good work, good work.

JUSTICE ZAHRA: Excellent answer.

CHIEF JUSTICE McCORMACK: I'll get you back.

JUSTICE VIVIANO: That means he didn't listen to the question.

JUSTICE BERNSTEIN: There's a lot of truth to that.

CHIEF JUSTICE McCORMACK: So the question is are there cases that facts matter more? Yeah, there are. I think when we have to decide harmlessness in a criminal case, facts are critical. There's one example, right?

And, you know, there are other cases where -- obviously I don't think it's easy to categorize most of the rest of them because they're -- hopefully most cases that reach our court, we're really focused on the legal question and the facts, we think, are sufficient to set up the legal question, but there's, you know, static at that point and settled and have been passed on. And so I

guess the one area I think they matter the most is when we're deciding the question of harmlessness in criminal cases. I'll stop there.

MS. MASSARON: Okay. Justice Markman?

JUSTICE MARKMAN: Well, I agree with Chief Justice McCormack. That's one area in which we do spend a great deal of time trying to hash out the facts. Another area is when we're reviewing ineffective assistance of counsel cases. We're looking very closely at the details and the implications of those details.

I also find an area in which we have to devote a great deal of time to parsing the facts is with regard to offense variable cases in the sentencing guidelines realm. We had a case not too long ago, for example, addressing whether or not the OV factor pertaining to defendant's leadership of a criminal activity, and sometimes there are some pretty subtle things that you have to assess to determine whether or not the OV scoring is right. But, of course, there's always a great deal of deference shown to the trial court judge who's originally obligated to assess the guidelines as he or she sees fit.

MS. MASSARON: Justice Zahra?

JUSTICE ZAHRA: So when I heard the question, my gut response was, well, in the criminal cases it seems like we're always mulling over the facts, and that's been proven true by the responses, the first two responses you've heard. I would say that we try to avoid -- in the application process we're trying to avoid the cases that are very fact intensive. We're looking for nice clean legal issues.

So, you know, in the civil arena, even if it's a fact-intensive case, if you in the course of presenting your application to us are able to present it as a clean legal question, even though there might be a lot of facts or, you know, the pertinent material facts are limited, that would probably serve your client best. But as I said, cases in which facts are -- cases in which we're dealing with the facts the most are the criminal cases.

MS. MASSARON: Justice Viviano?

JUSTICE VIVIANO: And I, of course, agree. You know, we're not really equipped to resolve factual disputes. You know, that's why we have juries. We don't get to see the witnesses testify in our court. And so we really don't want to be in a position where we have differences of opinion about what happened in a case.

And so, you know, we'll look sometimes more at the facts, you know, in a bench trial situation, particularly in a civil case, but a criminal case as well -- those are more rare I guess -- where there's a clearly erroneous standard that gives us some reason to look into the facts more than you would in terms of looking behind a jury's verdict.

But generally speaking, you know, we realize -- as Justice Zahra said, we're looking for a case where the facts are established so we can debate about what the law should be as it applies to those facts.

MS. MASSARON: Justice Bernstein?

JUSTICE BERNSTEIN: So I agree. I would answer the question -- I would answer the question by saying -- I don't think this one is working.

MS. MASSARON: Is that one working?

JUSTICE BERNSTEIN: Is it working? Maybe it's a sign. I should quit while we're ahead.

JUSTICE ZAHRA: We're going to take that microphone to the court with us.

JUSTICE BERNSTEIN: I was going to say, exactly. Exactly. Unfortunately now it is working. But, you know, I think it goes to a bigger question and a more kind of philosophical question, and I think that when you ask a question --

JUSTICE VIVIANO: How is that possible,
Richard?

JUSTICE BERNSTEIN: Because you know what?
Now that you've enticed it, now you're actually going to
have to hear. But I think that the reason is that I
remember having a conversation about, you know, what
qualities go into being a really good judge, and people
said, oh, it's academics or intellectualism, and those
are all important things, but I think what it really
comes down to is life experiences.

I think life experience is the most valuable
component of being a jurist because life experience
allows for you to understand and appreciate the
challenges and difficulties that those who come before
you have to experience and have to face.

And in answering this question, I would
ultimately say that yeah, I mean, we can talk about
jurisprudential significance and we can talk about those
kind of things, but in many situations, facts do matter,
and good judges are there because we are elected to use
the experiences that we're given, the experiences that
we've grown up with, to allow for us to apply the law in
a way that is appropriate, that is just, that is
reasonable.

Because at the end of the day you have the abstract, but you also have the practicality of what you're doing and what the implications are, so I think you are supposed to take in real world life experience, apply those to the facts that you're given, and render a judicial response to that based on the law as to which you apply it.

But the reason facts do matter and the reason that experiences are important is that you don't overlook something, you don't miss something. When you have a multi-judge panel, the reason it works so well is because the real goal of that is to make sure that no premise, no point, no issue is overseen.

MS. MASSARON: Justice Cavanagh?

JUSTICE CAVANAGH: Well, clearly I have a wealth of experience and background to share with you on that. No. But let me tell you about all I've seen in three months. No, for me, what I have noticed is, particularly in child welfare cases where the facts really matter, and actually drawing on what Richard just said too, I think that that's an area in particular for me when I look at those cases of -- you know, it's a pretty -- it's one of the most important decisions, you know, that you're going to make in people's lives I think of protecting children and protecting parental rights, so I think that those are necessarily required, you know, to take a deep dive and

look and make sure that you've got the facts right in those cases.

MS. MASSARON: So in the briefing process, we know that some cases, the facts are very complex. We've just heard, and I think this is something for us all to keep in mind, that in presenting the issue we don't want it to appear to be so much a question of facts as the facts setting up a legal issue for the court, but how in presenting the discussion of the facts, complex facts in particular, can we best do that so we serve our client's interest before the court? Justice Viviano, do you want to start with that one?

JUSTICE VIVIANO: Sure. So remember your audience and have mercy on your audience. So think about all the facts in the case and think about -- you know, marshal all the facts, but then tell a story that makes sense to the listener, to the reader of your brief, so they have just the facts they need to understand what happened in the case as it relates to the legal issue that you're asking us to decide.

So we don't want a bunch of extraneous facts. We don't need to go back to the beginning of time. We understand, as Justice Bernstein so eloquently said, you know, these cases have a big impact on people's lives, and we want to be attentive to the facts and to how the

case is going to be impacting people, but we really want to focus on the legal issues.

So it's the same with my clerks when they're writing me memos. I ask them the same things. Yeah, I want you to account for all the facts, but then part of your job and my job when I was an associate at Dickinson Wright was to not give the partner every single fact in the world on this file. It was to give the partner the facts that that person, he or she, needed to be able to advise their client.

MS. MASSARON: Thank you. Justice Zahra?

JUSTICE ZAHRA: So the truth of the matter is factual intensity is going to impact the jurisprudential value of your case. If it is so factually intense that any rule of law we come out is going to be so narrow, it's not worth our time in taking that case. It might involve an issue that is truly jurisprudentially significant, but if it's so factually heavy, we're going to pass on your case and go to another.

I agree with what Justice Viviano said. Give us a story that's easy to read and makes sense and is actually enjoyable to read. I like things in chronological order. I'm really amazed how many times I'll read a brief where things are -- seem to be going along chronologically, and then all of the sudden there's

the jump back in time, and to me I find that incredibly confusing.

It is an art. We want a story, we want only the relevant facts, but you also risk losing credibility if you put in what you believe to be relevant facts and leave out what your opponent believes to be relevant facts because when we pick up that brief and see something that wasn't in the first brief, you know, eyebrows are raised. And, again, if it's in an application, you know, as opposed to an actual brief where we grant it or a MOAA, you're probably done.

MS. MASSARON: Justice Markman?

JUSTICE MARKMAN: Well, I very much agree with what Justice Zahra just said, which kind of leads me to the two points I always suggest need to be taken into consideration in preparing your case. One, as Justice Zahra alluded to, is that we are looking for cases in which an understanding of the facts is necessary on our part, but they're not really dispositive in the sense that we're looking for cases in which the resolution of 100 or 200 cases will be influenced in the future by our legal holding in the instant case.

In other words, you need to ask yourself what is it I can share with the court in my case to focus them on something beyond the specific details of that case so

that they will come to appreciate that the resolution of some aspect of my case is relevant to the resolution of hundreds of cases in the future, which is what a court that's trying to develop the law needs to do. So the first question is, how does your case potentially mesh with cases in the future, how can I explain the consequences in my case as being pertinent to those hundred cases?

And secondly and relatedly you have to ask yourself why among hundreds and hundreds of cases in which we have denied leave each month did we think it appropriate to focus attention on your case? And almost certainly, as Justice Zahra's suggesting, we didn't attempt -- we didn't focus attention on your case simply because of its facts, because of the distinctiveness of its facts, but because there was something that possessed in common with a great many other cases.

MS. MASSARON: Justice McCormack?

CHIEF JUSTICE McCORMACK: I feel like there are diminishing returns at a certain point, so feel free to move on question-wise. I agree with everything everyone else has said. When you say complex facts, I assume you mean complex contested facts because, you know, frankly, I agree with my colleagues. If it's complex contested facts, that's probably like, you know, the end of your

case in our court. You know, that's going to make it unlikely that we dig in and deal with it.

So hopefully if you have complex facts, you can say, "Despite the complex facts, there's one simple set of facts that matter for this court's attention, and that's the one that we need you to focus on because a rule of law will be helpful to the jurisdiction." So I would say tell us the facts are not complex. That's what I'd tell you to do.

MS. MASSARON: So let's then move on, taking that cue -- and I think that's right so we can move along through a number of questions. We know that the common law develops by precedential decisions. We know that we live in an age of statutes, and probably the court's workload in Michigan and around the country and certainly in the federal courts is more governed by statutes than common law today than it was 30 or 40 years ago, but common law still matters.

And so the question is, when common law grows by incremental decisions, extending a rule or contracting a rule or creating an exception to a rule, to what extent -- how do you think about that and how can we argue if we have a case that we think might be a common law case and we're trying to persuade you to take it? I'll start with the chief justice maybe.

CHIEF JUSTICE McCORMACK: Didn't I already go first once?

MS. MASSARON: Oh, sorry.

CHIEF JUSTICE McCORMACK: No, it's fine. I think this is a great question and a really interesting question, and if the question is how do we think about the facts when the legal issue that's presented to us will require us to think about expanding or contracting a common law or rule, I think the facts matter a lot in those cases because the -- you know, when you learned in law school that bad facts make bad law, it's so true. Bad facts definitely make bad law.

So I think we want to be -- at least I personally want to think carefully about whether the particular common law question that comes to us and the question about whether to move or expand or contract whatever the common law rule is, is presented to us in a -- you know, in the context of a set of facts that aren't some crazy outlier that would be, you know, just a bad vehicle to consider what's kind of an important question and one that courts -- not just this court, but I think most courts nowadays feel very conservative about small C -- don't get all worked up.

You know, we should take steps if we're, you know, moving common law in either direction. It's disruptive and you don't want to send a signal to the

litigants and the lawyers that the common law is up for grabs every term. So I think -- I think they matter quite a bit when this is the context.

MS. MASSARON: And I'll just ask if any of you would like to respond so I'm not going up and down the line with every question. Justice Markman?

JUSTICE MARKMAN: Yeah, I think there's some people who come to the court in common law cases and think, well, there's no positive law here, there's no statute, no constitutional provision, so the judges have the plenary discretion to exercise their own judgment and do what they think is right and just, and I think you need to understand that even though the common law is essentially judge-made law, it doesn't afford us that unlimited discretion to exercise our judgment and to do what we might personally prefer and to do what we might have done when the law was first developed 500 years ago.

You need to be aware of the constraints that apply to that common law. One is that, as the chief justice just indicated, the law tends to develop very incrementally and slowly in either direction. It tends to be based upon a number of traditional virtues and values, such as the premises and propositions of individual responsibility and personal accountability.

And most of all, it tends to be a law that has been formed over the decades and the centuries, and you

really have to look at the history of the law and the precedents and consider that it moves rather glacially and not suppose that this is an area of the law in which each of the justices just gets to look to their own conscience and decide how suddenly it ought to be transformed in a way that's in better accord with that conscience. It's a much more subtle area of law than that.

MS. MASSARON: Justice Zahra?

JUSTICE ZAHRA: So I was going to just defer to Justice Markman because he's got an excellent opinion in the area of common law and when it should change. It's High Pointe Oil. I don't remember the name of the other party, but it was really -- I just so much enjoyed reading it when he first circulated it.

I'd like to say that my favorite Supreme Court opinion is one of my own, but that one that Steve wrote is truly a great opinion. If you have a question of common law, if you want to detract or move the common law or, you know, keep the common law where it is, I would say start by reading Steve's opinion in High Pointe Oil. Do you remember who the other party was?

JUSTICE CAVANAGH: And I hear the briefing was excellent.

JUSTICE ZAHRA: Did you do it?

JUSTICE CAVANAGH: Just saying. I did. It was Price versus High Pointe.

JUSTICE ZAHRA: There you go.

JUSTICE CAVANAGH: Yeah.

MS. MASSARON: So, Justice Cavanagh, would you care to weigh in further on this point?

JUSTICE CAVANAGH: No, I was just -- I would agree --

JUSTICE VIVIANO: She thinks it was a brilliant opinion too.

JUSTICE ZAHRA: I heard that the lawyering was great and that the judges really didn't know what they were doing.

MS. MASSARON: I'm sure she didn't say that.

JUSTICE CAVANAGH: I don't know. No, I was going to agree with Justice McCormack. I think that that area is, you know, sort of in contrast to some of the other areas or cases that we decide where the facts and fact really matter because if you're going to -- I agree it should be changed, you know, or expanded or contracted, whatever, very cautiously and incrementally, and so it matters what those facts are to do that.

I was going to -- but back to the last question, if I could, of just, you know, how to present the facts. I think what's very effective -- I tried to

do it when I was a practitioner, and in the briefs I read that I think are most effective are where obviously, yes, tell the story with your facts, but you have to know what story it is that you're trying to tell so that the story that you're leading to at the end of your facts is flowing into your argument.

You know, like if you're making the argument of why this witness' testimony, if it was improper, would have made a difference and should have been excluded, then tell the story of the trial so that, you know, we're right there with you, and by the end when you say -- oh, now I see why that is, you know, all the detail. And so sometimes, you know, the procedure is what matters and the, you know, chronology of it is what matters, but sometimes it's not, so whatever the -- you know, what the argument is.

I remember, I was thinking I had a couple cases in the civil context where it was after a trial and, you know, seeking to -- the judgment, notwithstanding the verdict or whatever it may be, and even though -- I would also raise the summary disposition rule or the order, appeal it on that as well, even though, you know, look it, you went to trial, it sort of doesn't matter anymore.

But if you could lay out the story of what was the evidence at the time that their motion was denied and

then go and tell the story of the trial, you're going to see like this is the reason why we should have been granted it at summary because, look it, they didn't do any better there. You know, so -- and at that point I didn't care if I won on the summary disposition argument or the trial argument.

But know the story that you're telling, and it's not always just the story of the actual facts or the underlying incidents. A lot of times I think it's the procedure and how things went in and would have made a difference if they'd gone in differently.

MS. MASSARON: Anybody else, or should I move on?

JUSTICE VIVIANO: I guess I would just add, getting back to the common law point, you know, we're called upon to think about the common law when we have cases that are entirely driven by the common law, but also when we have statutory cases where the legislature has decided to incorporate a term that's acquired a particular use in the law.

And a lot of times lawyers will either not pick up on that and just quote regular dictionaries, and other times they'll quote Black's Law Dictionary, but, you know, we're really interested in what the common law of

Michigan is, as we should be since that's the state that we live in and the law that we're pledged to uphold.

But in that effort, one thing that I'm always interested in is, you know, where do we fall? Where does Michigan -- where does our law fall? Are we with the majority of states that are in this area? Have we departed from the majority of states? If we've departed, are there reasons why we've departed that we can understand?

You know, and I'm also interested in what the secondary authorities say, so not only other cases from other courts or the federal courts or the other state courts, but, you know, what do the treatises say on these topics, the people who really spent their lives studying these issues? I think it all helps us -- it helps me understand what Michigan law is and why is it where it is, and it gives you a much better sort of grounding to try and decide if we should make a move if you really think long and hard about why we are exactly where we are.

MS. MASSARON: Thank you. That's helpful. I should say, because I neglected to say at the beginning, Phil DeRosier is collecting questions, so as we're proceeding, if you have questions, write them on an index card or a piece of paper that's on your table and hold them up so he can share those questions as we go.

And I'm going to ask Phil to like give me a warning time because I didn't bring my watch up here, so I don't want us to be here till 5:00 with the fascinating discussion which I think we could have for that long a time.

CHIEF JUSTICE McCORMACK: Judge Talbot does want to be here till 5:00. He told me.

JUDGE TALBOT: I can't wait.

JUSTICE VIVIANO: Is he giving another speech?

MS. MASSARON: So let me move on to sort of the practical implications of the rule or a holding. I had some other questions I was thinking about. Some of them have been discussed on earlier panels, so I want to talk about that. We often know -- we're there and we're arguing for a particular rule and we're arguing all the reasons in the law, the precedents or the interpretation of the statute or the secondary authorities about why the rule should be X and not Y.

To what extent does the court think about, well, how is the trial court going to apply this rule, what are the practical difficulties either of the trial court or of some industry or some group of individuals, and how can we help make sure we're doing a presentation

that does justice to those issues? So, Justice Cavanagh, we'll start --

JUSTICE CAVANAGH: I would just say I think that that's at times one of the most important considerations. I know from being a practitioner is, you know, wanting to know -- whether it be actual cases or things like court rules or that, it's how does this -- you know, is there any difference between how this looks on paper and how it actually plays out on Friday morning in Wayne Circuit.

You know, I think that that's important to always try and consider, and I think -- you know, I think that that's also one of the benefits of having diverse backgrounds and experiences. You know, I mean, frequently David and Brian, having been trial court judges, that they have a different, you know, perspective of or can offer insight that if you haven't sat as a trial court judge you may not know, and the same with all the different varied experiences on the Court of Appeals. But I think the real world implications of that are -- at least I try and think of that in every case.

MS. MASSARON: Justice McCormack, Chief Justice?

CHIEF JUSTICE McCORMACK: Yeah, I have to

agree. I mean, you know, the law can be an ass, but if we could avoid it being an ass, it would be nice, right? So it's not irrelevant. Justice Cavanagh said it well.

MS. MASSARON: Justice Markman? Everybody's agreed with that? All right.

JUSTICE BERNSTEIN: Well, you know, I'll answer really quick.

MS. MASSARON: Sure.

JUSTICE BERNSTEIN: I just would say that one of the things we should always think about is, ask yourself when you're arguing a case, how would you like the opinion to be written? You know, think about it. Like always kind of put yourself in that perspective of what should an opinion say, what's the import, what's the impact of it?

But one of the things that's really helpful is, is that, you know, when you're making an argument you can help us by saying to us, you know what, this is what I think you should focus on, these are the priorities. But I think ultimately it's a brilliant question because the court is always looking for a road map, and that road map is going to allow for us to have an understanding of what the impact is going to be by all the other lower courts.

And I would say that the first question that you usually get asked when you come to the Supreme Court is, you know, is this a jurisprudentially significant case, and if -- you know, when you're kind of up at the podium, that's going to be the most kind of essential element of your argument is allowing for us to understand, either at the briefing stage or if you get to a MOAA stage or to a full grant stage, why does this matter? Not just to you, not just to your client, but why does this matter to the people of the state of Michigan?

And I think if you're able to answer that question effectively, you'll be able to take into account what the implications are going to be by the Court of Appeals and the trial courts as to how the opinion's going to be interpreted.

JUSTICE VIVIANO: I would --

MS. MASSARON: Go ahead, and then I have a follow-up. Go ahead.

JUSTICE VIVIANO: Yeah. I would just add that in terms of practical implications, we all have to think about practical implications to whom. I mean, there's practical implications to our clients and to their industry. And we are fortunate, we hear from amicus parties who, you know, file briefs and help us think through those questions.

We have to think about implications for lawyers and how does it affect the practice of law. We have to think about implications for the courts. Is it going to shut down the Wayne Circuit Court or the Macomb Circuit Court, where I sat, if we come up with a rule that's so convoluted and difficult to apply that, you know, the court would never be able to implement that rule?

So we obviously need your help in thinking through those issues. I mean, and it could be on a granular level, what's the practical implications of our ruling in this case? Do we remand? You know, what court do we remand it to? What are we telling them to do? So, you know, obviously we want you to tell us what is it that you would like us to do with your case.

But then also the broader question is really where the rubber meets the road at our court. What are the implications this case is going to have more broadly? And if you see big problems, you know, we want to hear about them. Obviously we want to know that. And usually we hear those kinds of arguments.

MS. MASSARON: Okay. Anybody else like to address that question? Well, let me follow up on a little bit of a side question, but it's important. Justice Bernstein mentioned the sort of magic words of MOAA. Some of us have been lucky to be in a couple of breakouts discussing that procedure.

We are all I think, or most of us, familiar with the court's order and Justice Viviano's concurrence about that procedure, but I think while we're all in the room it might be good to spend a minute or two talking about the court's use of MOAA. And maybe, Justice Viviano, if I could ask you if you could sort of describe what it is and what you're thinking about as a court.

JUSTICE VIVIANO: Okay. So we just had one of the breakout sessions, and obviously MOAAs are a big topic at the conference and I think a big topic in the bar in general. We have a proposed rule change to I think improve or reform some of the ways that we handle that process where we hear argument on the application. We haven't decided whether to take the application or not. I think that there is -- these improvements would be good. They'd allow for sequential briefing, for example, so everybody doesn't file their brief on the same day to try to tee up the issue for us better or sharpen the issue.

But the question is, is this a good practice or not? I know folks are frustrated because a lot of the MOAAs end up denials, so more resources are invested and, you know, the parties who -- it's interesting that the parties who invest those resources are probably happy at the time because their case is still alive, but then

they're unhappy if they get the standard denial order because they think, well, you could have saved me a bunch of time and money by just doing that before.

And one interesting observation from the panel discussion is there's this -- you know, the question I asked in my concurrence is should we continue this practice? I think we're the only state that does this. Is it working well, or is it having some unintended consequences that maybe make the costs outweigh the benefits of the practice?

Interesting to me was there did seem to be a split between the civil and the criminal lawyers. The criminal lawyers seem to like MOAAs more and the civil attorneys less, and so that was one thing that sort of came out of that discussion we had.

And I think, you know, one of the -- sort of the nub of the issue points is the fact that, you know, back in the old regime where there were grant orders, it was very relatively unusual to lig, to try to get out of a case without issuing an opinion. There's sort of a stigma attached to that to issue an order that says leave was improvidently granted. Or implies that I guess.

And so, you know, the question is now we've had this great MOAA procedure where, as a court, if we have not yet made up our mind, we can think about it for a

little longer, hear from the parties, but then still issue a denial order and it's sort of, you know, no skin off our necks to do that. And I'm sensing that we're getting some sort of, you know, response to that that's not always positive I guess.

And so for me, no offense to my colleagues, but I'm much more interested in what all of you think about that process and it's been nice to have the conversation.

MS. MASSARON: Well, maybe I could formulate another related MOAA question that everybody could respond to, either generally or specifically, and that is, when you are deciding whether to grant a MOAA or whether to grant a full application, what are the criteria that prompts you to differentiate between one and the other? It's not wholly apparent to the bar.

JUSTICE CAVANAGH: You mean you can't figure it out?

JUSTICE VIVIANO: I don't want to hog all the time, but I think everybody might have a little different answer to that question, and that's probably why. It's not the same with all of us either. I think in the first order, what I said before for me is sometimes we haven't decided if we want to get fully into the case and we want to think about it a little bit more, and hearing

arguments gives us really a nice opportunity to do that and think about whether this case is the right vehicle, whether there will be a consensus on our court to take a step in a certain direction or not, and then we still have sort of the emergency latch we can pull to get out of the case if we decide this isn't the right case.

JUSTICE BERNSTEIN: I think that the way I kind of always approach things or how I kind of try to go through life is, I think the most important thing you can do is to create options. That's really the essence of it. You know, whenever you hit a challenging situation, the first question I always ask are what are my options? I just want to know what my options are.

The reason that I think we tend to use MOAAs more prevalent than a full grant is that the MOAA allows for options, and I think when you have more options rather than less options and you have a multifaceted court, it allows for a better disposition that I think can be beneficial to all people involved.

You always want to operate with the ability to maneuver, and when you're negotiating and discussing -- because, remember, you know, it's very different, you know, as you guys all know because this is what you've dedicated your lives to, but when you talk to trial court judges, it's one and done. And in the Supreme Court it's a constant negotiation, it's a constant

discussion, it's highly academic, it's highly intellectual, it's all the reasons we love doing it.

So when you have those kinds of varying perspectives, the MOAA grants you that ability to kind of add one more component into it that gives the court more freedom and flexibility in order to act in a way that in many situations can satisfy seven people over like one person, and I think that's the key essence or element that goes into the MOAA.

MS. MASSARON: Justice Zahra?

JUSTICE ZAHRA: So your question was in deciding whether to grant a MOAA or an app, you know, what prompts us to differentiate? For me, if I'm certain that we're going to hear arguments and issue an opinion, that's a grant. If I'm concerned that we're going to hear arguments and realize that we've walked into a hornet's nest, then a denial is much preferred to a lig. There is a stigma that the court took on. You know, we've just admitted error. Leave improvidently granted. We shouldn't have done that. So the MOAA gives us that option.

Additionally, the MOAA was a shorter argument time. Sometime, and I don't know -- I can't say that more recently, but in the recent past I think we issued MOAAs when we should have done grants because we knew we were going to write opinions, but we did it because it

was a shorter argument time and we didn't feel that the full, you know, 30-minute argument was warranted. So we've addressed that now by I think issuing more grants and then saying you've got 20 minutes of argument.

My answer to your question directly, currently, what differentiates between a MOAA and a grant order for me, if I'm certain that this is going to result in an opinion of the court, it's definitely a grant.

MS. MASSARON: Justice Markman?

JUSTICE MARKMAN: Well, I think the initial impulse behind the MOAA procedure was to render more symmetrical our appellate process. Our process has traditionally been that in order to reverse we needed five votes, and in order to affirm the lower courts, we only needed four votes, so I guess --

JUSTICE ZAHRA: Peremptorily.

JUSTICE MARKMAN: Peremptorily, right. And I think there was a growing sense of frustration that we wanted a more expedited and informal way by which we could reverse peremptorily, and that was the initial impulse. I think to make a long story short, my colleagues are correctly recognizing that the MOAA is no longer largely a prelude to a grant, but increasingly a substitute for a grant, and if you want to put your best

foot forward, you need to do it at the time the MOAA is being considered.

You need to assume that if there is a MOAA, it is going to be resolved on the basis of what has been filed and you have to be as effective and as thorough as possible at this juncture..

MS. MASSARON: Chief Justice McCormack?

CHIEF JUSTICE McCORMACK: I went to a small group on this yesterday, so you heard a lot from me, so I won't belabor it. I mean, as everybody knows, when the MOAA was first invented, most of us were not here, so we take -- I take Justice Markman at his historical word. But I think we built the MOAA -- or the court built a MOAA cocoon at a time it needed it for certain process reasons, and like we could break out of it and come out as a butterfly. I think I said that yesterday.

In other words, I'm just one person, so my vote is not much, it's one. But I do think that it's been nice to hear from all of you about the unintended consequences and what that might teach us about how we can both get -- manage our process so that we are more confident about the cases we grant, and which might mean more front end work, but also do better by the bench and bar, so I appreciate all the feedback on the topic.

MS. MASSARON: Justice Cavanagh?

JUSTICE CAVANAGH: Yeah, I say from the -- my experience as a practitioner, I think that the staggered briefing is a huge improvement. I know it can be very frustrating as a practitioner and I now can see it for the justices is that, you know, you could be just passing each other in the night if you're both filing a brief at the same time on a question that was teed up, and so the -- staggering it I think is a great improvement.

I think that there -- and what I am just sort of seeing in the time that I've been up there is it's almost sort of a gut feeling, like is this going to -- like Brian said, is this going to likely result in an opinion, then I think it should be a grant, but if it's like I'm just -- I need something more to know if this is something that we need to do on, so, you know, that sort of feeling, then I think -- I find it very helpful I think.

And I know as a practitioner, I -- yeah, you have the risk of leave being denied, but you got one shot -- you know, you get one extra shot that you wouldn't have already had to make your case of why to take it or why not to take it, and I was always -- I always thought that was a great procedure to have, particularly now that you actually have some meaningful briefing. I think that when it was -- (inaudible) -- I thought you would have briefs that weren't very helpful to the issue, so --

MS. MASSARON: So when you're looking at apps for leave, to what extents are you considering carefully the procedural posture of the case? How often is it a deciding factor, a major factor, whether the case is at an early stage or has a fairly limited record versus way down the line, and how does that factor weigh, or does it differ with different areas of substantive law? That's the question. Justice Viviano?

JUSTICE VIVIANO: So I think in some cases we're less likely to get involved in a case that's an interlocutory point where the issue could be resolved or brought back to us after a trial, but sometimes issues are brought to us where it makes more sense to try to address them on the front end or maybe remand it back to the Court of Appeals and have them address it on the front end.

You know, I'm trying to think of specific types of cases. It's a little difficult. Sometimes, you know, there's prosecutor appeals on an interlocutory basis. You might want to pay a little more attention to those because after a trial and an acquittal, the prosecutor can't appeal, so that's really their moment in the sun.

There are other things like that, other

particular instances, but I think more often we might say, you know, this case in addition to being, you know, fact intensive and, you know, the Court of Appeals opinion maybe was an unpublished opinion and it's remanding it back for a trial, it's an issue that would be reserved to bring to us later depending on how the case was resolved.

MS. MASSARON: Justice Zahra?

JUSTICE ZAHRA: I guess it depends on what you mean by procedural posture.

MS. MASSARON: Well, I think about sometimes cases that have a motion to dismiss or a motion for summary judgment that's brought at a very -- summary disposition that's brought at a very early stage so there hasn't been much factual development versus something that's at the end of the case after there has been multiple motion hearings in a trial and maybe post-judgment?

JUSTICE ZAHRA: Yeah. The only way I can answer it is that that is strictly a case-by-case analysis. There may be times where it is early in the proceedings but the question has squarely been developed, the parties even agree that it's been developed, there's no reason not to take that type of case.

So, you know, procedural posture, it's really about whether the issue is clean for me, not the posture of the case or where it is procedurally, and sometimes it's not clean because of where it is in the proceedings.

MS. MASSARON: Justice Cavanagh?

JUSTICE CAVANAGH: I'll just say I've noticed on some cases, even where it's a legal issue that perhaps, you know, is important and that we should maybe look at speaking to, I always find it very helpful the idea of having our Court of Appeals pass on it first if they haven't looked at it.

If this issue that we're sort of teeing up is saying this might be what is really sort of the issue that we want to get it, but I don't know if the Court of Appeals got to it, I mean, having -- or maybe even the trial court, having three or four more judges, you know, give us their insight into it and the parties having another opportunity to do that.

I always think -- I shouldn't say always, but in a lot of cases I think that that's a really important option because, you know, we could get a lot more insight and good briefing and good opinions from the Court of Appeals, that would really help us answer that question.

MS. MASSARON: Chief Justice McCormick?

CHIEF JUSTICE McCORMACK: Yeah, I -- yes. I

mean, you know, the more -- the more unsettledness there is to a case, the less likely I think we should stick our nose into it. I mean, the number of cases that you're allowed to appeal on an interlocutory basis in Michigan is stunning really, so, you know, go to federal court and they would think that this was -- I've had this question a lot from people who regularly practice in federal court, and they say, "It seems like I can appeal a lot of things on an interlocutory basis in your court system, is that true?" And I say, "Yep. Go for it."

MS. MASSARON: Absolutely.

CHIEF JUSTICE McCORMACK: But, you know, I think it's sort of usually better to stay out of it if there are unsettled things about it, so I think I agree with Justice Zahra in a meta-sense. It's just that there are more often likely to be unsettled things.

JUSTICE ZAHRA: And I agree with Justice Cavanagh. Sometimes we don't want to deal with it, so we give to our friends in the Court of Appeals.

JUSTICE CAVANAGH: I didn't say we don't want to deal with it. I said we can get a lot of help and insight. Very different.

MS. MASSARON: So let me ask this question which you've teed up for me, and that is, when we are in an interlocutory basis and we think the record is sufficient but the Court of Appeals has denied the

interlocutory leave, to what extent should we not maybe seek your review or maybe ask you to send it back to them and make them look at it now? I mean, how --

JUSTICE ZAHRA: That's your fallback.

CHIEF JUSTICE McCORMACK: Yeah, that's what you always do. What do you mean to what extent? That's what you always do.

JUSTICE ZAHRA: I've never seen an app that asks to specifically just send it back to the Court of Appeals. They say take it. But if you're not going to take it, then please send it back to the Court of Appeals.

MS. MASSARON: Okay. Excellent. That answers the question. We can all agree like cases should be treated alike, and that's obviously why the rule of precedent is so important. There's a longstanding debate in the literature and amongst courts about the scope or reach of precedent and how you define whether a precedent is controlling, and I think that's important in trying to get your attention on our cases because it can mean the answer of whether this is -- whether there's already settled precedent so there's no point for you to take it or whether there's not, to understand your thinking about precedent.

So I guess the question is, when you're analyzing the scope of a precedent, what does that precedent mean, whether you think it's controlling? How do you think about that? What do you look at? How would you define that?

JUSTICE BERNSTEIN: That is a Steve question all the way.

MS. MASSARON: Okay. Justice Markman?

JUSTICE MARKMAN: Well, I don't know that I volunteered for that question, but I think it is probably the most difficult question that disciplined judges have -- how to balance precedent with their own personal understanding of how the law ought properly to be read.

You know, we all take an oath to the laws of Michigan and to the laws of the United States and their constitutions. We don't take an oath to our predecessors on the Michigan Supreme Court. Yet having said that, I don't think that any body of law can operate in a stable, predictable, and reasonable manner if every time there's a new judge or justice on a court, everything is suddenly up for grabs and there's no respect or regard for precedent and the way that things have been done in the past. I think it's critically important that any legal system have in place some

deference indeed some considerable amount of deference -- owed to the decisions of predecessor courts.

At the same time, there are circumstances where precedents need to be reconsidered, and I guess the \$64 question is when does that arise and how, ultimately, do you resolve those cases? I think the Court did a reasonably good job in the *Robinson* case in 2000 in which we attempted to lay out a number of considerations that are relevant there such as the reliance interests that have grown up around the precedent, the duration of the precedent -- is it 8 years or 80 years or 180 years -- and the analytical quality of the precedent, that is, how certain the later court is that the precedent has been wrongly decided to the point that the people cannot comprehend the law by merely reading its terms.

I think you have to look at those kinds of things and determine when a precedent needs to be reconsidered or updated, and to me the most important consideration in this regard is what was laid out -- I thought correctly in *Robinson* -- and that was facilitating the compatibility of the written law with precedent.

To me the ideal of the judicial system, and everything I've done in my 20 years on the court to the best of my imperfect ability, has been to move the case law of our state toward that ideal, to render our case-

law increasingly compatible with the written law of the state. Our written law is the lodestar, the great guiding standard, and we are obligated to render the case law and the positive law of the state, increasingly compatible with one another.

And that's because the people of the state who are guided by these decisions of ours and our statutes should have the ability to read the law of the state and to understand what that law compels them to do, what their responsibilities and obligations are under that law, and each of you -- I may have suggested this yesterday -- as lawyers you should equally be able to read the laws of the state and reasonably be able to supply counsel to the people who come to you and say, "What do I need to do in this situation?"

And ultimately many of the great virtues of our rule of law system are best served and best expedited when judges and courts try to render increasingly congruent and the positive law and the case law of their jurisdiction. But it's a difficult question.

MS. MASSARON: It is. Anybody else care to speak about --

JUSTICE ZAHRA: So I thought Justice Markman did a great job of talking about precedent and what it takes to reverse precedent. But you also talked about

scope and reach of precedent, and, you know, it's a lot easier I think to get a judge to find a case distinguishable than it is to say wrongly decided and work it up through the ladder.

And as it relates to that, you know, I noticed yesterday was opening day, and I listened to the Tiger game on the radio because I was in my car. I can't tell you how many times I heard Jim Price say "the art of pitching, the art of pitching." We've all heard -- baseball fans heard that before? How many times has he said that?

It's the art of lawyering. It's on you when these cases are similar to be able to articulate, put into words, put into a brief or an application why these cases are different in a meaningful way and to help us. Our inclination is not going to be to distinguish on our own or to -- you know, we're trying to make these cases compatible.

MS. MASSARON: Thanks. I understand we have a question from the audience. I've got one more question, and I know we're almost at the end of our time, so, Phil, do you want to share the question?

MR. DeROSIER: Sure. Is this working? So, yeah, the question from the audience, once you hold a MOAA and then let's say decide to grant leave after the MOAA and to order full briefing and argument, the

question is, can you give us a sense of how often you decide to do that and what considerations go into having the parties go into full briefing and argument after the MOAA as opposed to taking some action at that point?

JUSTICE VIVIANO: Well, I would say it's pretty rare, but it does happen, and sometimes we get to a point in a case where we feel like the MOAA order maybe missed the mark a little bit and we need to have some other issues addressed for us to resolve the case, and so we'll do -- I think do a grant in those circumstances to try and get the case sort of back on track or at least back into focus and help us resolve the issue.

MS. MASSARON: To what extent would an advocate's argument during a MOAA that this discussion shows how complex the issue is or how difficult, but rather than denying leave, it also shows how important, so you should fully grant. Is that kind of argument one that would be well received, or would you be inclined to say, well, we've already had your briefs, we've already heard everything, you know, we're either going to issue our opinion or deny?

JUSTICE VIVIANO: I can't see us turning our back on that kind of an argument if it's compelling. You know, if the argument is, look, here's -- within the time we've been given, this is what we've been able to

do, but this case involves -- you know, there's subsidiary issues that we would love to be able to brief and argue even further that will help you understand this issue. I mean --

JUSTICE ZAHRA: Yeah, there are two sides to that. Sorry, though. You could talk us right into this being so complex or facts intensive that -- no, I think you would agree that that there are two sides to it. It's how you present it. And it could be that you convince us that it's so factually complex or that there's so much here that it's not the right case.

JUSTICE VIVIANO: No, I agree. I agree. I was thinking more just as the legal issue if you're telling us, you know, our focus is too narrow on the law. But I agree with Justice Zahra. If you're telling us you need more time to talk about the facts, yeah, you're headed in the wrong direction.

MS. MASSARON: Anyone else?

JUSTICE CAVANAGH: Can I just say something? So not about that. This is completely unrelated, but I have to say, so I have been coming or planning --

CHIEF JUSTICE McCORMACK: Is it about law or --

JUSTICE CAVANAGH: It is. It is.

JUSTICE ZAHRA: It didn't take you long to

learn how to act like a justice.

JUSTICE CAVANAGH: Right.

JUSTICE ZAHRA: Do whatever you want.

CHIEF JUSTICE McCORMACK: What's your favorite legal movie?

JUSTICE CAVANAGH: When someone asks me what book or what my favorite author is, right now I always say it's the MJI benchbooks right now on like sentencing guidelines and childwelfare.

No, I was going to say, so I've been coming to this conference or planning it since like 2004, right? And the question is always does oral argument really matter? And now I'm like I have the opportunity to say, at least in my opinion, it absolutely matters. So it was very satisfying to be able to have the answer to that because everybody is like does it, no, yes, no, yes? And I'm like yes, tremendously helpful.

JUSTICE VIVIANO: You're now answering your own questions?

JUSTICE CAVANAGH: I am. No, I just felt the need to say it and it's the only time I have a microphone, so --

JUSTICE ZAHRA: As I look at Judge Talbot, oral argument is for the benefit of the court.

JUDGE TALBOT: That's right.

JUSTICE CAVANAGH: It is, but it matters. MS.

MASSARON: Absolutely right. So --

CHIEF JUSTICE McCORMACK: And it's the only time when Richard gets to ask people, "What are you doing here anyway?"

JUSTICE VIVIANO: "Why are you here? Are you really making that argument?"

CHIEF JUSTICE McCORMACK: "Why don't you just give her her money?"

JUSTICE BERNSTEIN: Very probing.

MS. MASSARON: So I had a whole list of additional questions about bright lines versus standards and other kinds of things, but I think we're about out of time and I don't want to keep everybody here past the time. We have two more things to do. One is to thank the justices for all of their support by being here, but also for the conference in general, and we can do that.

(Applause)

MS. MASSARON: And last is to invite our treasurer, Tim Diemer, to say a few closing words before we finally close.

CHIEF JUSTICE McCORMACK: You can do that, Mary, but we also want to thank you and Phil and your entire committee for putting on a fantastic conference. We're very grateful.

(Applause)

MR. DIEMER: Good afternoon. My name's Tim Diemer. I'm the treasurer for the foundation. This is my fourth time serving as treasurer. When I first came on board, the foundation was running at a annual deficit. I believe the last conference in 2004 was in the red to the tune of \$29,000, and at that time when we planned a conference, costs came into consideration with everything we did. What speakers are we going to bring in? We had to decide how much it was going to cost. We didn't get to bring in speakers like Paul Clement back then.

When we planned the cocktail hour, we had to decide are we going to have cheese and crackers, are we going to have hot hors d'oeuvres, things like that. So if you remember, about ten years ago that lunch we had that was the hollowed-out pineapple with canned tuna on top, that was my fault. I apologize for that.

MS. MASSARON: That is true.

JUSTICE BERNSTEIN: That sounds actually quite good.

MR. DIEMER: It was not. It was not. In the 12 years since then we have come so far. This conference we have 118 scholarship attendees, people who are not paying the registration fee. Out of 340 attendees, we have 118 on scholarship. And then on top of that, we also

fund the judges' and justices' court staff to be here, which is what makes this conference so fantastic. So you've made my job much easier. I'm no longer just the Debbie Downer at the planning meetings.

And the reason we are in such good financial shape is partly we raised the registration cost to 375 from I believe it was 200 before, but also because of the generosity of the lawyers and the law firms that every conference we break a record for fundraising. I'm not exaggerating. The last three have all been record-breaking, and it's because of the generosity of the lawyers, the law firms, and also the Dewitt Holbrook Trust, which I'm so glad that Melissa and

Rachel are here to see the caliber of the conference we can put on because of their generosity.

So in addition to thanking all the donors and sponsors, I also want to thank two individuals in particular. This conference is so fantastic because of dozens and dozens of volunteers spending countless of hours working on these sessions, but there are two individuals who really go above and beyond the call of duty, and that would be our cochairs, Mary Massaron and Phil DeRosier.

(Applause)

MR. DIEMER: I'd like to present on behalf of the board a couple of parting gifts as we wind down here to Phil and Mary, if you can come on up. I warn you, they're a little heavy. So, Mary, thank you for all your hard work. Phil.

MR. DeROSIER: Thank you, Tim. I actually -- hang on one second. Let me go set this down. So I actually really appreciate the gift and, you know, thanks to everybody for all of the hard work in helping Mary and I put the conference together, and thank you to the judges and justices and staff for all of their help.

But I wanted to just spend a minute just to say something about Mary. As some of you know, this is going to be Mary's last conference cochairing. We hope that Mary's going to be involved helping us. She has such a repository of knowledge, so we sure hope that she's not going to abandon us.

But I want to just say a few things. It's been quite a run for Mary. She's cochaired every Bench Bar Conference since 1998, so think about that. Longer than many of us have even been practicing law. And so I thought about how to capture the significance of Mary's contributions, and to do that I talked to a few people, and I just wanted to share some of the things that Mary's colleagues have had to say.

"Mary is our rock, our appellate world superstar. She is without peer."

"What sets Mary apart is her commitment to public service, safeguarding the rule of law, and improving the quality of the advocacy before the Michigan Supreme Court and Court of Appeals. It is not an exaggeration to say that the Bench Bar Conference would not exist but for Mary's tireless dedication. Mary's contributions to the appellate bench and bar of Michigan are irreplaceable."

And one more. "I can't imagine the Bench Bar without Mary front and center. Her passion for the conference and for appellate practice hasn't wavered since the first conference. Her vision was and is to create an event that reflects the best of our profession, collegiality, thoughtful reflection, and a shared mission to improve the administration of justice.

She's welcomed colleagues, new and old, in the planning process and encouraged our participation. She exudes a warmth for the outstanding attorneys who attend, and her class, fine reputation, and careful planning have helped to ensure the continued involvement of our appellate judges and court staff.

The Bench Bar Conference isn't Mary's legacy alone, but she has been its life force, which speaks to why, after more than two decades, it's still healthy and vital."

I don't know about you, but I think that's pretty incredible for people to say those kinds of things. So, Mary, we just want to thank you and hope that you'll accept this gift as a token of our great, great appreciation for everything that you've done for the conference.

(Applause)

MS. MASSARON: Thank you all so much. It's been a labor of love. I love you all. It's been my passion. I'll still be around, but just in a sort of senior capacity. We're adjourned.

(At 1:52 p.m., proceedings concluded)

VIII. Potential Policy or Rule Changes Raised By Conference Participants

- Additional mechanisms for settling the appellate record. For example, in the Seventh Circuit, the parties must agree to what's in the record (with both sides having leeway to include documents that the other disagrees with).
- Standardized, detailed registers of action in the trial courts would make it easier to determine what transcripts need to be ordered.
- Potential new court rule requiring the trial court to keep track of (and store) the trial exhibits, or allowing the parties to file exhibits directly with the Court of Appeals.
- Potential new court rule requiring court reporters to transcribe videos or audio records.
- Consider expanding the time for filing post-conviction motions. Many from the defense bar agreed that an extra 56 days would help to allow for filing a motion in the trial court before moving in the Court of Appeals to remand. With that expanded timeline, the Court of Appeals need not get involved where the trial court can make a record. And for the defense, some issues require investigation that will take longer than the 56 days allotted to file in the trial court.
- Amend MCR 7.212(C) and MCR 7.212(D) to require an introduction or summary of argument.
- More published opinions from the Court of Appeals.
- Adopt one uniform appendix rule for both the Court of Appeals and Supreme Court.
- Consider revamping the Supreme Court MOAA process. One suggestion was to expand the 15-minute argument time.