AAML Michigan 2012 Seminar – Tips for Creating a Record for Appeal

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I. What You Must Do Before and During Trial

a. **An Appeal Won't Correct Attorney Errors.** An appeal is for the purpose of correcting *trial court* errors. It cannot be used to correct *trial attorney* errors. If an issue wasn't raised or evidence was presented, the remedy (sad to say) is a malpractice action, not an appeal.

   i. Just as it is dangerous to pull your punches at a referee hearing assuming you will get a "second bite at the apple" in front of the trial judge (we all know the flaws in that logic), it is a huge mistake to fail to fully and completely present all available evidence to the trial court thinking that there will be a second chance on appeal.

   ii. The Court of Appeals and Supreme Court will strictly enforce the rule against expanding the record beyond what was presented to the trial court. Extra-record material will be stricken from briefs on motion by the other party or *sua sponte* by the Court.

b. **Don't Give Away the Case.** Don't stipulate away important factual or legal issues. All trial court attorneys feel at least some pressure from trial judges to stipulate to at least some of the key facts in a case and perhaps concede certain legal issues. Don't do it, particularly if you suspect that either party may appeal an unfavorable decision.

   i. You don't want to appear unreasonable or inflexible to the trial judge because that could hurt your client's chances of prevailing at trial.

   ii. On the other hand, you don't want to exposure yourself to a grievance or malpractice liability, or even just bad word of mouth on the street from an unhappy client who is left without a meaningful appellate remedy. Ultimately, this is a balancing act between presenting "enough" evidence and over-doing it to the point that you hurt your client's chances of winning at trial.

c. **Monitor the Record as it is Created.** Order transcripts as the case progresses. Although the family division was supposed to remedy that problem of fragmented trials and evidentiary hearings, we still have cases heard a half-day or day at a time over many months. If an appeal is

likely, put the delay to good use and order the transcript at the end of each day of trial. This has at least three benefits:

i. It will be easier for you to prepare detailed and authoritative (with citations to the record) proposed findings of fact to submit to the trial court (see advice below on this question).

ii. It provides prospective appellate counsel more information to review in assessing the strength of a possible appeal.

iii. There may be less delay waiting for the court reporter to complete the transcript if you are waiting for just one day instead of half a dozen days to be transcribed. This could be beneficial in cases where time is a crucial factor.

d. **Keep track of exhibits (yours and theirs)**. Have a complete set of your trial court exhibits and all exhibits submitted by the other side.

e. **Brief Everything.** File briefs on legal issues before trial.

i. In the heat of battle in the courtroom, it is all too easy to forget a key legal argument. If you don't raise the issue on the record, it will not be preserved for appellate review and you may have jeopardized your client's chances on appeal.

ii. However, if you brief key legal issues in advance, that brief will serve as preservation of the legal issue (so long as you don't orally waive the issue at trial).

f. **Do the Judge's Job.** Ask the trial court for permission submit written findings, conclusions, and closing argument.

i. Submitting proposed findings forces you to think through your evidence and issues to make sure you have covered everything that needs to be addressed in order to maximize your client's chances of prevailing at trial – and on appeal.

ii. Having detailed proposed findings to work with will greatly reduce the risk that the trial court will make inadequate findings of fact. Inadequate findings may prompt the Court of Appeals to vacate the decision and remand for more detailed findings. This is an expensive and time-consuming process – and trial courts sometimes change their decisions when asked to revisit an issue on remand, turning a victory into a defeat if you are the appellee.

iii. A well-drafted set of proposed findings and conclusions is a great issue-spotting device for an appellate lawyer who may need to quickly advise a client on whether an appeal is worth taking.

g. **Go Digital.** To the extent possible, scan all trial court documents (pleadings, motions, responses, briefs, exhibits, orders, opinions, important correspondence, etc.) to searchable PDF format as the case progresses. Here are two good reasons:

i. The so-called 21 day appeal period is often illusory because of the delay in receiving a ruling from the trial court, getting it to the client, and finding appellate counsel. That can shrink the period for making the decision to just a few days. Being able to email key portions of your file to potential appellate counsel may make the difference between being able to file a timely appeal or not.

ii. Delay is even more problematic for applications for leave to appeal (all interlocutory appeals and all post-judgment appeals except those affecting child custody or awarding or denying attorney fees). An appeal by leave requires a complete brief and is initially much more time-consuming than an appeal by right.

iii. If you or your client's appellate attorney intends to use the C of A's very efficient and cost-effective efiling service, you will need the trial court record (orders, transcripts, exhibits, etc.) in PDF format anyway.

II. Court Rules and Case Law to Know After the Trial is Completed

a. What is the trial court record?

i. MCR 7.210(A)(1): "In an appeal from a lower court, the record consists of the original papers filed in that court or a certified copy, the transcript of any testimony or other proceedings in the case appealed, and the exhibits introduced."

ii. MCR 7.210(A)(3): "The substance or transcript of excluded evidence offered at a trial and the proceedings at the trial in relation to it must be included as part of the record on appeal."

iii. MCR 7.210(A)(4): "The parties in any appeal to the Court of Appeals may stipulate in writing regarding any matters relevant to the lower court or tribunal or agency record if the stipulation is made a part of the record on appeal and sent to the Court of Appeals."

b. Whose is responsible for securing the trial court transcript?

i. MCR 7.210(B)(1)(a): "The appellant is responsible for securing the filing of the transcript…."

ii. Transcript is due 42 days after ordering in child custody case, 91 days after ordering in other cases. MCR 7.210(B)(3)(b)(iii) and (iv).

c. What about the trial or hearing exhibits?

i. MCR 2.518(A): "Exhibits introduced into evidence at or during court proceedings shall be received and maintained as provided by Michigan Supreme Court trial court case file management standards."

ii. MCR 2.518(B): "At the conclusion of a trial or hearing, exhibits should be retrieved by the parties submitting them…. If the exhibits are not retrieved by the parties within 56 days after conclusion of the trial or hearing, the court may properly dispose of the exhibits without notice to the parties."

iii. MCR 7.210(C): "Within 21 days after the claim of appeal is filed, a party possessing any exhibits offered in evidence, whether admitted or not, shall file them with the trial court or tribunal clerk, unless by stipulation of the parties or order of the trial court or tribunal they are not to be sent, or copies, summaries, or excerpts are to be sent. Xerographic copies of exhibits may be filed in lieu of originals unless the trial court or tribunal orders otherwise."

iv. Exhibits that were not presented to the trial court may not be added to the record on appeal. *Cartwright v Cartwright*, 341 Mich 68, 67 NW2d 183 (1954).

d. Who is responsible for serving the record on the appellee?

i. MCR 7.210(F): "Within 21 days after the transcript is filed with the trial court clerk, the appellant shall serve a copy of the entire record on appeal, including the transcript and exhibits, on each appellee. However, copies of documents the appellee already possesses need not be served…."

e. Appellate review is limited to the trial court record.

i. References to facts outside the record developed in the trial court will not be considered by the Court of Appeals. *Wiand v Wiand*, 178

Mich App 137, 443 NW2d 464, *remanded* 205 Mich App 360, 522 NW2d 132 (1994).

ii. Ex parte affidavits, filed for the first time in an appellate brief, may not serve to enlarge the record on appeal. *People v Hoag*, 113 Mich App 789, 318 NW2d 579 (1982); *People v Pawelczak*, 125 Mich App 231, 336 NW2d 453 (1983).

iii. The remedy for extra-record material is motion to strike, not adding your own-extra-record material to counter extra-record material improperly cited or submitted by the opposing party. *People v Walker*, 371 Mich 599, 601-602; 124 NW2d 761 (1963).

f. Is there an appeal by right?

i. Only "final orders" are appealable by right. Other orders are appealable by leave only.

ii. Pursuant to MCR 7.202(6)(a)(i) a final order is "the first judgment or order that disposes of all the claims and adjudicates the rights and liabilities of all the parties, including such an order entered after reversal of an earlier final judgment or order."

1. This may include a divorce judgment. But if a judgment leaves any issue unresolved, such as a referral of personal property division to binding arbitration or referral of child support to the FOC for an updated recommendation, the judgment is not a final order and is not appealable by right. *Helms v Helms*, 185 Mich App 680, 462 NW2d 812 (1990). An appeal by right must wait until all issues are resolved by entry of a court order.

2. If you have an urgent issue related to custody or change of domicile that needs to be appealed immediately, persuade the trial court to avoid leaving issues unresolved in the judgment. In the alternative, ask the trial court to treat those issues as post-judgment modification proceedings to avoid killing your right to immediately file a claim of appeal from the judgment.

iii. Post-judgment orders, except those affecting custody or granting or denying attorney fees, are appealable by leave only. MCR 7.202(6)(a)(iii) and (iv) include within the definition of final order:

1. (iii) in a domestic relations action, a postjudgment order affecting the custody of a minor,

2. (iv) a postjudgment order awarding or denying attorney fees and costs under MCR 2.403, 2.405, 2.625 or other law or court rule,

iv. Some post-judgment orders for change of domicile or modifying parenting time may qualify as final orders "affecting custody of a minor" if they alter the child's established custodial environment. *Thurston v Escamilla*, 469 Mich 1009, 677 NW2d 28 (2004).

III. Concluding Thoughts

a. **Is the appeal winnable?** Few appeals involve greater than a 50% chance of getting the trial court reversed. In fact, almost all appeals come with less than a 50% chance of prevailing, sometimes substantially less. In family law cases, the trial court is given considerable discretion. It is very difficult to convince the Court of Appeals to reverse the trial court on a discretionary issue. If the appeal is primarily a disagreement with the trial court on how it viewed the facts, the chances of winning an appeal are not especially good. However, if the record shows that the trial court made a legal error, or erroneously applied the law to the facts of the case, the odds of winning are better, but almost always less than 50% - often far less.

b. **How important is the record to a successful appeal?** The key to a successful appeal is nearly always a strong trial court record. If you attorney presented all of the evidence that supports your client's position, that will help the appellate attorney made a strong factual argument to the Court of Appeals. If you made all of the available legal arguments to the trial court, those issues will be preserved for the appellate attorney to use on appeal.

c. **What is something was omitted at trial?** An appeal is based on the proverbial "snapshot in time." The facts and legal arguments presented at trial or the evidentiary hearing are the only facts and legal arguments that can be presented to the Court of Appeals. No facts can be added by the appellate attorney. New evidence discovered after the conclusion of trial cannot be used on appeal. Every fact stated in the brief on appeal must include a supporting citation to evidence in the trial court record. If you are not happy with the way the evidence was presented to the trial court, you will probably not be happy with the result in the Court of Appeals. Appealing on a weak trial court record is often a waste of time and money.

d. Who **will win on appeal?** In the vast majority of cases, the party winning at trial will also win on appeal.