



Briefing and Arguing Cases in the Michigan Supreme Court:

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INTRODUCTION

This guide is intended to assist attorneys with their written and oral advocacy in the Michigan Supreme Court, especially those who are making their first argument before the Court. In addition to this guide, counsel should review the following resources: Subchapter 7.300 of the Michigan Court Rules¹; the Michigan Supreme Court's Internal Operating Procedures²; Chapters 13 and 14 of the Michigan Appellate Handbook³; Chapter 14 of Civil Appeals by former-Justice Stephen J. Markman⁴; and Chapter 38, pages 858-865, of the ABA Council of Appellate Lawyers' Appellate Practice Compendium by John J. Bursch and Gaëtan Gerville-Réache⁵; A Practitioner's Guide to Effective Advocacy Before the Michigan Supreme Court, by Mary Massaron, pages 36-41 Michigan Bar Journal (February 2008)⁶; and Tips on Advocacy at the Petition Stage, by Mary Massaron, pages 41-46, For the Defense (November 2009).

Questions regarding cases to be argued should be directed to the clerk's office at (517) 373-0120. Please have your docket number available before placing the call. To view the docket of a particular case, visit the "Cases, Opinions & Orders" page⁷ of the Court's website and select "Case Search." You can search by docket number, party name, attorney name, or attorney P number.

ORDERS GRANTING LEAVE TO APPEAL OR DIRECTING ARGUMENT ON THE APPLICATION

The Michigan Supreme Court issues two types of orders in cases to be orally argued: An order granting the application for leave to appeal and an order directing argument on the application. The latter order is referred to as a MOAA (pronounced "mō-ah"), an acronym that stands for Mini-Oral Argument on the Application. The distinctions between the two order types primarily involve the periods of time for submitting the briefs and the amount of time allowed for argument, and will be explained in greater detail later in this guide. See [Oral Argument Time, infra](#).

¹ [Michigan Court Rules of 1985, Chapter 7. Appellate Rules.](#)

² [Michigan Supreme Court, Internal Operating Procedures \(IOPs\), Subchapter 7.300 Court Rules.](#)

³ Brian G. Shannon and Gaëtan Gerville-Réache, eds, Michigan Appellate Handbook (ICLE 3d ed. 2014).

⁴ Stephen J. Markman *et al.*, Civil Appeals (West Group Michigan Practice Guides 2003).

⁵ Appellate Practice Compendium (ABA Publishing 2012).

⁶ [A Practitioner's Guide to Effective Oral Advocacy Before the Michigan Supreme Court: With Special Tips from Benjamin Franklin \(michbar.org\)](#)

⁷ ["Cases, Opinions & Orders page"](#) of the One Court of Justice website.

In most leave granted and MOAA orders, the Court identifies the specific issues that it wants the attorneys to address in their briefs. If specific issues are not identified, the issues raised in the leave applications are to be addressed.

If you have a case that is to be argued, you should notify the clerk's office of any future scheduling conflicts—e.g., vacations, maternity or paternity leave, proceedings in a different court—as soon as you learn of them. Unless your case is an emergency or priority matter, such as child custody or termination of parental rights, the Court can usually be flexible in scheduling your case for argument. The Court is less flexible in adjourning a case once it has been assigned to the case call, especially if counsel failed to timely notify the clerk's office of a long-standing conflict.

You should also immediately advise the clerk's office if you need any reasonable accommodations at oral arguments so that suitable arrangements can be made.

BRIEFS AND APPENDICES

CONTENT AND FOCUS

Briefs in calendar cases⁸ must be prepared in accordance with MCR 7.312(A), which references the requirements of the Court of Appeals' briefing rule, MCR 7.212. Supreme Court briefs should address the legal correctness of the appealed disposition; the specific facts of a case are less important than the proposition of law. Appellants' briefs must seek to convince the Court to adopt a new rule of law, change an existing rule, construe a statute that has not been interpreted before, or correct a previous construction that you believe was wrongly decided. Use only those parts of earlier pleadings that advance your cause at this point in the proceedings.

You should write clearly and concisely, using plain language and avoiding legalese. Organize your arguments logically to establish your points without getting sidetracked by tangential issues or inconsequential facts. Proofread carefully, cite-check all cited cases to ensure that they have not been reversed or overruled, and confirm that every case stands for the proposition for which it is cited. Accurately summarize, paraphrase, or cite cases and portions of the record so as not to mislead the Court. Even an innocent misstatement can jeopardize your credibility and that of your brief. Prioritize your arguments and winnow out those that are less persuasive. State the precise relief you are asking the Supreme Court to grant and explain why that request is

⁸ A calendar case is one in which the Court has granted the application for leave to appeal or an original action that is to be argued at a monthly session (e.g., a JTC disciplinary case). MCR 7.313(A).

supported by the law and facts. Avoid impugning the lower courts, opposing counsel, or other parties.

When preparing your brief, understand your audience. The Justices and their law clerks are generalists so your brief should educate as well as inform. Explain the “big picture” of the applicable area of the law to the Court and indicate how your case fits within that area. Draw the Court a roadmap of how it is to get from point A (the current state of the law) to point B (the position you are advocating). This is especially critical if prior Court of Appeals or Supreme Court cases need to be overruled or the common law need to be changed.

Keep in mind that the Court’s priority is to develop or clarify the jurisprudence of the state; it is not necessarily concerned with the outcome of a particular case. That the Court has agreed to hear oral argument clearly indicates that it has an interest in the ramifications of the case. Explain that significance to the Court and describe how a decision in your favor will have a positive impact beyond resolving your case. On the macro level, tell the Court what you believe the thesis of its opinion should be and explain why the law supports that thesis. Tell the Court the “rule of law” that you would like it to articulate in your case and all similar cases that will come before the state’s courts. On the micro level, tell the Court how to support that thesis or rule by applying the law to the specific facts of your case.

APPENDICES

The appellant and appellee may file joint or separate appendices with their briefs on appeal. Joint or individual appendices must include: (1) the trial court/tribunal judgment or order being appealed, along with any written opinions, memorandum, findings of fact or conclusions of law stated on the record; (2) the trial court/tribunal register of actions; (3) relevant pages of any transcripts cited in support of an argument, (4) when a jury instruction is challenged, the language of the instruction and those portions of the transcript whether the instruction is discussed or requested; (5) any other relevant exhibits, pleadings, or evidence submitted to the trial court/tribunal; and (6) the Court of Appeals opinion or order being appealed. Appendices must contain a table of contents and must be paginated sequentially at the bottom of the pages. MCR 7.312(D), 7.212(J)(2). Appendices that are filed electronically must be a separate file from the e-brief and transmitted as a single PDF unless the file size exceeds the 25 MB limitation of the MiFILE system, in which case it can be separated into two or more PDF documents. Electronic appendices must be text-searchable and bookmarked. Appendices filed in hard copy must be separate from the brief and bound in a manner that can be easily taken apart for scanning, MCR 7.312(D), 7.212(J)(2).

FILING

Important Note: Hard copies of briefs and appendices need not be provided to the Court if they were electronically filed using the appellate e-filing system, [MiFILE](#). Beginning on February 1, 2020, attorneys must submit their briefs and appendices through the MiFILE system. [Admin Order 2014-23](#). Filings may be transmitted to the MiFILE system 24 hours a day, seven days a week (with the exception of the system's downtime required for periodic maintenance). Electronically filed documents that are received by 11:59:59 PM Eastern Time on a business day will be docketed as being filed that day. Electronic filings received between 12:00 a.m. and 11:59 p.m. on a Saturday, Sunday or court holiday will be docketed on the next business day. MCR 1.108(1) and MCR 8.110(D)(2).

Self-represented litigants may use the MiFILE system or they may mail or deliver one set of the original signed documents to the Clerk's Office at 925 W. Ottawa Street, P.O. Box 30052, Lansing, MI 48909.

The appellant's brief and appendices are due within 56 days after the date on the order granting leave to appeal unless a different time is specified in the Court's order. MCR 7.312(E)(1) & (J)(1). The appellee must file its responsive brief and appendix, if any, within 35 days after receiving service of the appellant's brief. MCR 7.312(E)(2). The appellant may file a reply brief within 21 days after receiving service of the appellee's brief. MCR 7.312(E)(3). The Court, on its own motion or that of a party, may order a longer or shorter briefing period. MCR 7.312(J)(1). A brief is considered filed on the date the clerk's office receives it, not on the date you mailed it, with the exception of briefs submitted by incarcerated parties. A motion to extend the due date of a brief should be filed in advance of the brief deadline whenever possible. The motion must show that there is good cause for the extension and that the delay in filing is not due to the culpable negligence of the party or attorney. MCR 7.316(B).

SERVICE

A party must serve two copies of its brief and appendix on each attorney who has appeared for a separate party or group of parties and on each party appearing pro se. MCR 7.312(F)(2). In criminal cases and cases in which the state is a party or interested, each party must also serve one copy of its brief and appendix on the Attorney General. MCR 7.312(F)(3). Service must be accomplished in a manner allowed under the court rules, such as by first-class mail, hand delivery, or e-mail. MCR 2.107(C).

The hard copy service requirements **do not apply** if the parties are electronically served through the MiFILE system. Registered MiFILE users agree to accept e-service through the MiFILE system unless and until the user's registration is terminated. A document electronically filed after

11:59:59 PM Eastern Time, or on a Saturday, Sunday, or court holiday shall be deemed to have been filed or served on the next business day. MCR 1.108(1) & MCR 8.110(D)(2).

RECORDS

The record before the Supreme Court consists of the materials filed in or generated by both the trial court/tribunal and the Court of Appeals, including the pleadings, motions, transcripts, and court opinions and orders. MCR 7.310(A). The lower court records are received, either in hard copy form or electronically, at the application stage before entry of the order granting leave or directing argument on the application.

The Supreme Court returns the original record to the appropriate court or tribunal after its decision is final. MCR 7.310(B).

ORAL ARGUMENTS

NOTICE AND SCHEDULE OF ARGUMENTS

Approximately 35 days before the next case call, the clerk of the Court emails the notice of cases to be argued to the attorneys of record, including attorneys for amici curiae. Arguments are usually scheduled on Wednesday and Thursday of the first or second week of January, March, April, May, October, November, and December. Except in special or emergency situations, arguments are not scheduled in February, June, July, August, and September. But see, e.g., *In re Request for Advisory Opinion Regarding Constitutionality of 2011 PA 38*, 490 Mich 295; 806 NW2d 683 (2011) (argued September 7, 2011).

The notice of arguments indicates the dates of the case call and identifies the attorneys who are presumed to argue on behalf of the parties. You must notify the clerk's office immediately if a different attorney will actually argue the case. Most arguments are held in the 6th floor courtroom in the Hall of Justice, Lansing. But once or twice a year, arguments in a MOAA case are held at an off-site location across the state as part of the [Court Community Connections](#) program.

The schedule of arguments is posted on the Court's website at least 21 days before the first day of argument. The schedule lists the date and approximate start time of the arguments in each case. Attorneys who are endorsed to argue should check in with the clerk's office on the 4th floor of the Hall of Justice at least 15 to 20 minutes before the arguments are scheduled to begin.

If you failed to request oral argument on the title page of your brief as required by MCR 7.312(C), you will not be allowed to argue unless you file a motion for oral argument at least 21 days before the first day of argument. MCR 7.313(B)(2). If neither party reserves the right to oral argument, the court clerk designates the case as submitted on the briefs. MCR 7.312(B)(2). The parties may stipulate at any time that a case be submitted on the briefs. MCR 7.314(A).

Oral argument sessions are public hearings that open to all citizens and members of the media.

ARRIVAL AND PROCEDURE

Driving directions and parking instructions are available on the [Supreme Court's website](#). You should allow yourself sufficient time to drive to Lansing (or other argument location) to take into account possible delays due to the traffic or poor weather conditions, as well as the time needed to pass through the security screening at the Hall of Justice, which may be five to ten minutes depending on the number of people coming into the building. By arriving early to the courtroom you can observe other arguments to get a sense of the Justices' level of engagement with the attorneys.

The Chief Justice will call each case when the Court is ready to hear the arguments. The attorneys should move as quickly as possible to the tables at the front of the courtroom. Counsel for the appellant sits at the table to the right of the podium (as you face the bench) and counsel for the appellee sits at the left side table. Parties are not permitted to sit at the counsel tables during argument.

PREPARING FOR ARGUMENT

Oral arguments should emphasize and clarify the arguments in your written brief and not simply summarize your brief. Argument is your opportunity to stress the main issues and arguments of the case that might persuade the Supreme Court in your favor. The argument you prepare should reflect the unique focus of the Supreme Court. Though precedent is important, your argument should also stress the practical implications of the Court's decision. Prior case holdings may not be as important as they are in the Court of Appeals. The fact that the Court has granted review suggests that the Justices intend to reexamine the issue rather than automatically follow precedent.

The oral arguments of the Supreme Court are streamed live on its [website](#) and are archived for later viewing on its [YouTube channel](#). If you have not previously appeared before the Court, you should watch several arguments (live or recorded) in advance of your own to get a sense of how to effectively argue before the Court.

Being prepared for oral argument requires a thorough knowledge of the record, the general area of the law governing the case, and the law as applied to the specific facts of record. You

should review all the briefs and the record to re-familiarize yourself with the procedural history, the relevant substantive facts, the applicable law, and the cases cited in the briefs. You should also search for any pertinent cases that were issued after the briefs were filed. Review and understand the finer points of your opponent's argument, as well as your own. You should be familiar enough with the case that you could argue either side, and be aware of the strengths and weaknesses of both positions.

The Justices will be familiar with the factual background and procedural history of your case so you should spend little, if any, time discussing it unless it directly bears on issue. You should, however, be prepared to answer any questions that arise regarding those aspects of the case.

Be aware that oral argument before the Supreme Court is not simply an occasion to argue the points in your brief. You should re-examine and rethink every aspect of your case to determine whether there is another legal basis that supports your position. The Justices have conducted independent research on your case so you should not be surprised if they approach it from a different perspective than that in the appeal briefs.

The Justices will ask questions that focus the argument on what they view to be the most difficult questions of law. To anticipate their questions and concerns, familiarize yourself with individual Justice's decisions in the relevant area of law. If an earlier Supreme Court opinion is particularly important to your case, note whether any current Justices also participated in that case and, if so, how they voted. This will give you an idea of which Justices are likely to be receptive to your argument and which are likely to be resistant.

In arguing before the Supreme Court, counsel should anticipate a thorough interrogation. Expect numerous questions from the Justices addressing your arguments, as well as those of your opposing counsel. In preparing for your argument, you should try to anticipate the questions the Justices will ask and prepare to answer them. Be able to defend the weak points of your position against attacks from your opponent and questions from the Justices.

ORAL ARGUMENT TIME

The Supreme Court order granting the leave application will specify the time allowed for oral argument. MCR 7.314(B)(1). In most cases, each side is allowed twenty minutes for argument. Some cases may be granted thirty minutes to argue. If a case has multiple appellants or appellees, all parties on the same side must divide the time allotted for argument.

When a case is called, the appellant's counsel should step to the lectern and begin when the Chief Justice signals either verbally or by turning on the flashing yellow light at the front of the podium. The appellee's counsel should step to the podium when the appellant's counsel steps away and similarly await a verbal signal or the turning on of the flashing yellow light before

beginning. Both attorneys should begin by introducing themselves and stating which party or parties they represent.

The Supreme Court's practice is to allow counsel two minutes of uninterrupted argument; a flashing yellow light on the podium marks this period. Use this time to set forth what you consider to be your most important arguments. You may waive the uninterrupted period in whole or in part. If you intend to waive the entire period, tell the Court at the beginning of your argument.

Counsel for the appellant may reserve time to rebut the appellee's attorney's argument by requesting at the beginning of the initial argument a specified number of minutes for rebuttal. Counsel for the appellee is not entitled to any rebuttal time. Be aware that it is solely the responsibility of the appellant's counsel to keep track of the time reserved for rebuttal so counsel may want to bring a stop watch or a smart phone with that function to the lectern with them. If the appellant's counsel uses all the argument time in the initial argument, regardless whether the time was spent answering the Justices' questions, counsel will be denied rebuttal argument despite reserving it.

If review was granted on the basis of more than one application, the Court generally indicates the sequence of argument. If no sequence is specified, the parties should assume that the party who filed the first application will argue first.

Expect that you may be subject to questions from the Justices during the entire argument time (or longer if the questioning continues beyond the allotted time). The yellow light indicates that you have five minutes remaining, and the red light indicates that your allotted time is up.

If you have made all points you intended to make and yet still have time left, you should conclude with a brief summary of your argument and tell the Justices that you would be happy to answer any further questions. If there are none, return to your seat at counsel's table. You risk diminishing the impact of your argument by mechanically reverting to prepared text. And, the Justices will appreciate your brevity.

THE MECHANICS OF ORAL ARGUMENT

Have your argument well prepared. While outlines and notes are appropriate, the Supreme Court looks with disfavor on an argument that is read from prepared text. Think of and present your oral argument as a conversation with the Justices, rather than as a prepared speech. Make and maintain eye contact with the Justices as much as possible. This may allow you to see whether the Justices are following your arguments, or are bored, confused, or disagree with something you have said.

In making your argument, be candid and credible. Start off forcefully, making your strongest points. Just as in your briefing, you should refrain from gratuitous attacks on the lower courts or your opponent. Attempts at humor or sarcasm are risky and should be avoided.

To be an effective advocate for your client, it is important to have a theory of the case and stay on message throughout the argument. Begin by outlining your theory and the main points you intend to make. Give the Justices a roadmap. Don't dwell on the specific facts of your case; instead, provide the Justices with your thesis. Be prepared to explain how you would write the opening and concluding paragraphs of the Court's opinion.

Be ready to argue your case entirely without interruption but anticipate questions from the Justices. Questions are opportunities to clarify your argument and help the Justices come to your position. The Justices' questions are invaluable clues to what concerns them about the case; embrace the opportunity to alleviate their concerns. Note, however, that the questions and comments of a Justice do not necessarily indicate the manner in which he or she intends to vote or analyze the case. Justices who are favorable to your position may occasionally ask questions that are intended to persuade their colleagues on the bench. Seize these opportunities when they arise.

If a Justice interrupts you when you are speaking, you should stop talking immediately and listen. Promptly addressing a Justice's question is much more important to succeeding in oral argument than continuing with your argument. Listen carefully to what the Justices say in their questions and comments to both you and opposing counsel. Be flexible enough to respond affirmatively to new theories or new interpretations set forth by a Justice. If you do not understand a question, ask the Justice to clarify it. If you don't know the answer to a question, don't guess. If you are wrong, the Justices may think that you are either attempting to mislead them or that you incorrectly believe something to be true that is not. It is better to acknowledge that you do not know the answer, than to answer incorrectly. Instead, offer to provide a supplemental brief on the question after arguments if the Justices would like.

In responding to the Justices' questions, do not be overbearing or aggressive but, conversely, you should not be timid. It is perfectly acceptable to respectfully tell a Justice that you believe he or she is incorrect on a point, and explain why. It is also acceptable to challenge the premise of a Justice's question in answering, or to explain why you believe that a hypothetical situation being posed is distinguishable from your case.

Do not avoid or fail to answer a Justice's question. Rather than avoiding a question that hurts your argument, either concede the point, as appropriate, or explain why the point is not dispositive of your case and why your side still should prevail. For example, you might suggest that the question is focused on an irrelevant matter, that it misperceives what is principally in controversy, or that it requires some elaboration. If you think that a question is not particularly

important or relevant, do not demean or reject it; simply respond to the question and then return to the point you were making.

Again, it is important to remember that, from the perspective of the Justices, oral argument is not just about your case. It is about the rule of law that the Court will lay down for future cases. Be prepared to address how your case will affect other cases. Understand and be prepared to discuss the policy implications of your case for the state's jurisprudence, which is to say that you should be ready to discuss the potentially far reaching implications of the rule you are urging the Court to adopt.

ARGUMENT IN MOAA CASES

Under MCR 7.305(H)(1), the Supreme Court may direct oral arguments on whether to grant leave to appeal or take other action on an application, such as affirming or reversing the Court of Appeals, remanding to the Court of Appeals for consideration as on leave granted, or remanding to the trial court/tribunal for further proceedings. A MOAA gives the Supreme Court an opportunity to explore the issues involved in the case without the full briefing and submission that follow a grant of leave to appeal.

A MOAA order will state whether the parties are required or permitted to file supplemental briefs, and will set the briefing deadline. MOAAs are scheduled for oral argument and discussed at conference in the same manner as calendar cases.

The same rules for oral argument in calendar cases apply to MOAAs except that each side is generally limited to 15 minutes of argument. Given the limited time for argument, reserving time for rebuttal, while possible, may be impractical. It is therefore imperative that you are clear and concise when making your arguments and answering questions.

Keep in mind that if the Court has ordered a MOAA, it is likely interested in a specific issue that it considers important but is unsure whether that issue warrants a full grant. Oftentimes the issue will be flagged in the order directing argument. If so, your supplemental briefing and oral argument should focus on that issue. It will likely be regarded as controlling by the Court.

It is also important to recognize that, in MOAA cases, the Court is less likely to issue a full opinion following argument and instead may resolve the case in a more summary fashion, either by order or in a memorandum or per curiam opinion. Think carefully about what you would like the Court to do, and discuss and defend your position at oral argument. If you believe the case can be resolved with a peremptory order, be prepared to tell the Justices precisely what the order should accomplish. If your goal is to convince the Court to grant leave to appeal, tell the Court why denying leave or issuing a peremptory order is insufficient.

DECISION-MAKING PROCESS

CONFERENCING AND OPINION WRITING

The Justices discuss each case in detail during regular pre-argument conferences. Thus, the Justices are well acquainted with the facts and issues in the case and much of the decision-making process has occurred by the time oral argument takes place.

After oral arguments, the Justices meet in a private conference to make a preliminary determination as to how the case will be decided. A Justice who is in the putative majority will be assigned the task of writing the opinion. Writing assignments are made randomly on a rotating basis so that the work is distributed as evenly as possible among the Justices.

Draft opinions are circulated to the other Justices, who may sign them without change, request changes, draft and circulate concurring opinions to express different points of view, or draft and circulate dissenting opinions. An opinion that garners the approvals of a majority of the participating Justices becomes the majority opinion. The case is decided when each Justice has signed the final draft of one of the circulating majority, concurring, or dissenting opinions. All calendar cases argued before the Court are expected to be decided by July 31 of each year. If a calendar case is not decided by term end, the parties may file supplemental briefs and may re-argue the case if requested in writing within 14 days of the new term. MCR 7.313(E).

ORDER OR JUDGMENT

Once finalized, all majority, concurring, or dissenting opinions are filed with the court clerk. The clerk date stamps the opinions, emails them to all participating attorneys, including counsel for the amici curiae, and posts them on the Court's website.

The clerk enters an order or judgment on the date the opinion is filed. MCR 7.315(C)(1). In exceptional circumstances, the Court may direct the clerk to immediately issue the order or judgment when the opinion is filed. MCR 7.315(C)(3). However, the order or judgment generally is issued between 21 and 28 days after its entry, or promptly after a timely motion for rehearing is denied or disposed of on rehearing. MCR 7.315(C)(2).

Unless otherwise noted, an order or judgment pursuant to an opinion is effective when it is issued. MCR 7.315(C)(4). Orders and judgments, other than those pursuant to opinions, are effective on the date of entry. MCR 7.315(D).

The Supreme Court Reporter of Decisions prepares opinions for publication by writing a syllabus to the opinions, which includes brief statement of the relevant procedural and substantive facts, summaries of the legal holdings, and the disposition of the case. Opinions are published in

advance sheets as soon as practicable. MCR 7.301(E)(3). Bound volumes are published as soon as practicable after the last opinion included in a volume is issued. MCR 7.301(E)(4).

GENERAL INFORMATION

The Supreme Court is housed in the Michigan Hall of Justice at 925 West Ottawa Street in Lansing. The building is located between Ottawa Street on the north, Allegan Street on the south, and Martin Luther King, Jr., Boulevard on the west. Parking is available off Allegan Street, just east of the Hall of Justice. The clerk's office is located on the 4th floor and is open Monday through Friday from 8:30 a.m. to 5:00 p.m., except on court holidays. The courtroom is located on the 6th floor.

The Court's website⁹ provides access to recent opinions, docket sheets, videos of oral arguments, and other information about the Court. Opinions are posted on the website within a few hours after they are entered and emailed to the attorneys.

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⁹ <https://courts.michigan.gov/courts/michigansupremecourt>

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