Michigan Appellate Assigned Counsel System

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Spotting the Appellate Issues in Trial Appeals

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ISSUE SPOTTING

FOR

MICHIGAN CRIMINAL APPEALS

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INTRODUCTION

This manual is designed to assist appellate attorneys in one of the most critical aspects of handling an appeal – identifying the potential issues in the case. This skill is the foundation upon which all of the other functions of appellate counsel must build, for surely without effective identification of the issues the appeal is doomed to failure from the start.

This manual is not intended to, and could not be, an all inclusive review of possible issues in a criminal appeal. The scope of possible issues is unlimited, given the infinite variety of fact situations occurring during criminal prosecutions, changes in the law produced by legislative action and court decisions, and the creativity of appellate attorneys. The manual will instead focus on the basics of issue spotting. The first sections will discuss generally the processes and strategies involved in searching for issues in a court record, particularly where appellate counsel did not handle the trial court proceedings. The manual will then review the different stages of a criminal prosecution, describe the issues common to each stage, and note the applicable case law, statutes, and court rules.

The manual is not meant to be the final word on issue identification. It is a guide to issue spotting skills and a reference to key or leading cases in each area. For the inexperienced practitioner, it provides a road map of the criminal process with warning signs for wrong turns, dangerous curves, new construction, and common bumps and potholes. For even the experienced criminal lawyer, it will provide a starting point for research focused on the particular situation of an individual case.

This manual should be seen as a companion to other MAACS manuals dealing with more specific topics, such as Felony Sentencing and Effective Assistance of counsel, plus other substantive manuals issued by separate training sources.

CHAPTER ONE

THE PROCESS OF ISSUE SPOTTING

I. THE FUNCTION OF APPELLATE COUNSEL

Before beginning a discussion of the processes by which issues are identified, some consideration must be given to a more basic topic – the function of appellate counsel. The role appellate counsel plays in the justice system is quite relevant to the subject of issue spotting, as understanding the purposes of the appeal forms the blueprint for the identification, preparation, and presentation of the issues. Any attorney who intends to handle a significant number of appeals should first fully appreciate the general goals and objectives of appellate practice.

Contrary to the role played by trial counsel, the appellate attorney is not primarily concerned with the guilt or innocence of the client, or more properly put the ability of the prosecution to prove the charges beyond a reasonable doubt. This is not to say that appellate counsel should not, whenever the opportunity presents itself, seek to persuade the appellate judges that the appellant is in fact innocent of the charges or guilty only of a lesser offense as a means of predisposing the bench to grant relief. However, the principal goal of the appeal is not to convince the court that the finder of fact was in error. Appellate judges do not sit as finders of fact, and will not, except in unusual circumstances, overrule the verdict itself. The primary function of the appellate attorney is to convince the appellate court that the client was not fairly treated in the lower courts, regardless of factual guilt. The task of issue spotting should not be undertaken without this function clearly in mind.

The appellate system acts as a check on the operations of the trial courts. Absent intensive review in the appellate courts, the rights of litigants as individuals, and the application of the law in general, would be protected on an ad hoc basis, depending solely upon the particular predilections of the trial judge. Effective issue identification is the groundwork upon which the system must depend. Counsel for the appellant lays that groundwork by focusing appellate review on specific areas of the trial court proceedings. Appellate counsel cannot rely upon the courts, which lack the personnel, the perspective, and the predisposition, on their own to raise or frame issues that the parties have not first identified and argued. Appellant's counsel holds the powerful position of setting the scope of appellate review. In order to adequately represent a client on appeal, the attorney must understand what an appeal is designed to accomplish, and master the techniques necessary to present the case to the reviewing courts in the most advantageous and complete posture possible given the factual record.

In identifying issues to be raised on appeal, appellant's counsel should not confine his or her inquiries to the existing law. The appellate courts are a primary vehicle for change in the law. Many of the legal propositions and procedures in criminal law that are now thought of as fundamental are the direct result of the creative inspiration of appellate counsel. While in general it is easier to be successful in a specific appeal where an argument is based on existing authority or precedent, counsel should never lose sight of the need to propose and argue innovative solutions to inequities, even where success in the particular case appears remote.

For example, a review of the Michigan Supreme Court decision in People v Aaron, 409 Mich 672 (1980), reveals strikingly how aggressive advocacy over the years culminated in a recognition of the inherent unfairness of the felony-murder doctrine in Michigan, even though there was no legislative change in the statute. Attorneys argued in numerous cases that the common-law felony-murder doctrine, which held that any killing occurring during the commission of one of the enumerated felonies constitutes a murder, was contrary to a basic theory of criminal jurisprudence that a person should be punished for his or her individual intent. This argument finally was accepted by the Court of Appeals in cases such as People v Fountain, 71 Mich App 491 (1976). The Supreme Court in Aaron then granted leave to appeal, and ruled the statute should be construed to require a finding that the accused had the requisite intent for murder before there could be a conviction for felony-murder.

Changes in the law such as Aaron do not normally come about in a single case. Courts must often be persuaded over time and over many cases that a particular practice does in fact result in injustices. Appellate counsel must be constantly vigilant, even in eras when the courts are hesitant to expand or retain protections for defendants, to look for not only what was done wrong in the past, but also what should be done differently in the future.

In Michigan, assigned appellate attorneys must meet the requirements of the Minimum Standards for Indigent Criminal Appellate Defense Services, which have been approved by the Michigan Supreme Court, Administrative Order No. 1981-7, 412 Mich xxxv et seq. Standards 9 and 10 concern the topic of issue spotting:

> "9. Counsel should assert claims of error which are supported by facts of record, which will benefit the defendant if successful, which possess arguable legal merit, and which should be recognizable by a practitioner familiar with criminal law and procedure who engages in diligent legal research."
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> "10. Counsel should not hesitate to assert claims which may be complex, unique, or controversial in nature, such as issues of first impression, challenges to the effectiveness of other defense counsel, or arguments for change in the existing law."

These standards do not require that every conceivable issue in a case be submitted to the reviewing court. The issues presented should be those reasonably capable of affording some actual relief to the client, without presenting risks of more severe punishment if successful. These requirements, however, mandate by implication that appellate counsel identify every possible appellate issue before a decision is made as to which will ultimately be submitted to the court.

A decision on the threshold question of arguable legal merit cannot be made without recognition of the potential issue, diligent research on the law, and careful consideration of the factual and legal consequences to the client if the issue is run. The fact that an attorney identifies one issue that appears to present compelling grounds for relief in the courts does not relieve the attorney from the obligation to identify and investigate all other possible errors in the case. The number and methods of presentation of the issues can always be pared down and refined after the legal research and strategic considerations are evaluated. Failure to recognize potential

issues initially, however, makes compliance with these standards, and adequate representation of the client, impossible.

II. GETTING AND READING THE RECORD

A. Obtaining the Record for Appeal

It should go without saying that before any attorney, and especially any appellate counsel who was not also trial counsel, can review a record for possible errors, the attorney must have adequate access to the raw material of the appeal – the record of the proceedings below. While this principle may appear to be beyond legitimate dispute, in fact the current state of Michigan law on the rights of appellate counsel to adequate access to the record is the result of years of fighting with often reluctant or recalcitrant courts and budgetary officials over the production of records and transcripts in indigent cases.

Attorneys may still run into problems getting transcripts, records, reports, and other documents or exhibits from officials unwilling to pay the costs of providing access. Assigned counsel do have the tools, as discussed below, to require compliance with requests for records, but should temper the use of these tools with the recognition that a fight over production of records is time-consuming, and a diversion from the real work of the appeal, where alternative methods of obtaining the materials are available. Maintaining good relations with court officials, while at the same time educating them if necessary on the right to obtain records, should minimize the administrative headaches that can often threaten to overshadow the substantive work.

The primary argument for assigned appellate counsel is that Due Process and Equal Protection guarantee a transcript on appeal. The United States Supreme Court has consistently held that an indigent defendant has the right to transcripts on appeal. Griffin v Illinois, 351 US 12; 76 S Ct 585; 100 L Ed 891 (1956); Mayer v Chicago, 404 US 189; 92 S Ct 410; 30 L Ed 2d 372 (1972). See People v Cross, 30 Mich App 326 (1971), affirmed 386 Mich 237 (1971). It has been held that an undue delay in the production of transcripts may result in a due process violation, or may at least entitle the defendant to release on appeal bond. Rivera v Conception, 469 F2d 17 (CA 1, 1972); Moore v Egeler, 390 F Supp 205 (ED Mich, 1975).

Under the current Michigan system, problems in receiving transcripts should be rare. Pursuant to MCR 6.425(F)(2), the order appointing counsel must include an order to prepare the trial, plea, sentencing, and "such transcripts of other proceedings, not previously transcribed, that the court directs or the parties request", and must provide for payment of the court reporter's fees. Under MCR 7.210(B)(3), the reporter has strict time guidelines for the filing of transcripts. These rules normally will automatically provide the assigned appellate counsel with the major transcripts in each case. Therefore, counsel must be diligent in comparing the order for production to the court docket entries, and the recollections of trial counsel, to insure that all proceedings that were conducted on the record will result in transcripts. It is not uncommon that the initial order for production will omit evidentiary hearings, arguments on pre- or post-trial motions, arraignments, record waivers of jury trials, preliminary examinations, competency hearings, or other proceedings which could contain significant issues. Delayed discovery of missing transcripts causes substantial problems in timely filing of pleadings, and more importantly may prejudice the presentation of any issues discovered in the most recently received transcripts.

A copy of the docket entries is usually provided to assigned appellate counsel with the order of appointment. The Court of Appeals generally considers that any further transcript ordered by counsel within four weeks of the appointment is timely requested. The time for filing of the brief does not begin to run until after the filing of the last timely requested transcript. MCR 7.212(A)(1)(a)(iii). Where the court reporter is overdue in filing an ordered transcript, counsel should file a show cause motion in the Court of Appeals, in order to preserve the client's right to a timely filed brief, if direct contact with the reporter fails to resolve the problem.

Two problem areas should raise red flags for assigned appellate counsel. Where more than one court reporter was involved in a case, take particular care that each reporter is preparing all of the transcripts that reporter is responsible for, and has filed the required certificates. Second, while rarely seen, some courts may have a practice of not transcribing, or even not recording, particular portions of a proceeding, such as jury voir dire or the oral reading or playing in court of written or recorded statements. Attorneys should insist upon transcription of the entire record, or production of the documents or tape at issue for use as exhibits to the appellate courts.

Finally, while too involved for a detailed discussion in this manual, attorneys should be familiar with the requirements and procedures for settling a record if production of a transcript is impossible. See MCR 7.210(B)(2).

Minimum Standard 6 states that "Counsel shall promptly request and review all transcripts and lower court records". This Standard is not only a requirement for adequate representation, but can be used to support a request for production of records. The requirement that assigned counsel review the entire court record, including but not limited to the transcripts, carries with it an implicit obligation of the courts to provide reasonable access to that record.

While MCR 6.425 does not require the trial judge to sua sponte order production of a copy of the court file for the assigned appellate counsel, there is court rule support for a request for the file. MCR 6.433(A) provides that an indigent defendant may file a written request for specified court documents for use in an appeal as of right, and that the sentencing court must order the court clerk to provide the requested copies at the state's expense. The form order of appointment approved by the State Court Administrative Office contains language ordering the clerk to produce records. Similar provisions for production of records are set forth in the remainder of MCR 6.433 for appeals by leave and other post-conviction proceedings. In addition, MCR 6.425(C) specifically states that the appellate attorney has a right to a copy of the presentence report. See also MCL 771.14; MSA 28.1144. Counsel should ask for copies of psychological evaluations or sentence guidelines calculations in addition to the presentence report.

Where assigned counsel is physically able to view the court file without undue inconvenience or expense, it is the better practice to review the file first and then make a specific, written request for documents from the file that could lead to or contribute to issues. Alternatively, the trial court docket entries can be reviewed as the basis for a specific request for documents. As always, it is best to be over-inclusive when requesting documents, particularly since they are normally requested before the transcripts are reviewed. Where counsel, due to the distances or time factors involved, cannot realistically view the original file before making a request, the written request should be for the entire file, including but not limited to a listing of documents commonly found in criminal files. While again it is better to get too much information rather than too little, counsel should be sensitive to the budget and staffing limitations felt by most court clerk's offices,

and avoid requiring unnecessary work if at all possible. For example, if copies of file documents can be easily obtained from trial counsel, the client, or other sources for free, there is little sense in putting those costs on the clerk's office. Of course, no cost consideration can outweigh the obligation of counsel to review the entire file.

B. Reading the Record

Assuming the entire record is now available, including all transcripts, the next step is deciding how best to read that record with the goal of efficiently yet completely identifying the possible issues. Different appellate attorneys use different methods, and there is no objectively "correct" way to read a file. For attorneys just beginning to handle appeals, it may be best to experiment with several methods and decide upon a procedure that feels most comfortable. Whatever method is selected, it must have as its principle objective a thorough review of the entire file and spotting of all the potential issues.

The methods used by appellate attorneys to read files differ mainly in the order in which particular portions of the file are read. Some attorneys prefer to read closing arguments first, to get a flavor of the facts and disputed issues in the trial court. Some prefer to read the trial itself before reading the pre-trial or other proceedings. Some may read the sentencing first.

This author's preferred practice is to read through the court file itself first, in chronological order starting from the earliest documents up to the sentencing materials. In this method the charging documents are reviewed, along with all pre-trial motions, orders, and proceedings. Once there is a degree of familiarity with the written file documents, including the court's docket entry sheets, the transcripts are read, also in chronological order, starting with the District Court arraignment and preliminary examination. The final step is reading the sentencing transcripts and materials, including any post-trial motions or proceedings.

My reasons for using this chronological method are related to issue spotting. Many issues that first appear in a record grow or diminish in arguable merit as further events occur. Reading portions of the transcript out of order, such as closing arguments, may not reveal the significance of some issues absent a working knowledge of the preceding record. The initial reading of the record is not too early to begin the process of formulating how the issues will be structured and argued. The structuring decision can only be made with consideration of the totality of the case, in order to determine whether a harmless error analysis must be confronted. It is usually easier to get a handle on the totality of the case if the record is read in chronological order, so that the progression of the issue can be followed from the first indication of a potential error.

A second decision on methods of reading the record is to what extent notes are taken during the initial reading. Again, appellate attorneys use different approaches. Some take copious notes of the entire record upon the first reading. Others take minimal or no notes during the first reading, preferring to take extensive notes during a rereading. The method this author commonly uses is to take notes only as to potential issues, with citations to the portions of the record or transcript pages where events or testimony relevant to the issue appear and short statements as to the focus of the issue or any anticipated problems with the argument. As the rest of the record is read, additional notes can be added to each issue as warranted.

As with the different methods of reading a record, the different ways of taking notes present advantages and disadvantages. It is important, especially for newer attorneys, to experiment with different methods to find a system that is both comfortable and effective, and to be flexible enough to use different procedures where warranted. Note taking while reading a 1500 page trial transcript may be quite different than taking notes on a guilty plea or short bench trial record!

There are several advantages to taking comprehensive notes during the initial reading of the record. The most obvious is that once the notes are complete, the attorney has an organized and accessible reference guide to the record, which will be extremely useful during legal research and particularly when drafting the statement of facts. Unless the attorney is the exception to the rule and has a great deal of time available to work on the appeal to the exclusion of other cases, extensive notes will assist by eliminating or reducing the need to reread major portions of the record.

The disadvantages of taking extensive notes during a first reading increase with the length and complexity of the record. Taking contemporaneous notes while reading a substantial record is a very time consuming and draining endeavor. The increased time and energy needed to take extensive notes may lead the attorney to take less comprehensive, and thus less accurate, notes as the task progresses. The added time factor may also require that the attorney read the record in discrete intervals of time, separated by work on other cases. This may break up the flow or continuity of reading the file, which could cause issue identification to suffer.

One further, and potentially serious, disadvantage of taking extensive notes during a first reading is that the attorney may unconsciously pay more attention to producing full and accurate notes than to reading the substance of the record in a search for issues. An analogy to illustrate this problem is proofreading, where an emphasis on looking for misspellings, typographical errors, or correct citations can at times overshadow editing the substance of what is being written. Attorneys who use the comprehensive initial notes method should take care to remember that the primary goal is identification of issues, not the taking of notes.

The advantages of taking initial notes only on the issues spotted are that this method focuses the reader's attention on the tasks of looking for issues and following those issues along through the remainder of the record, the reading is done quicker and more likely in a continuous flow, and the reader is not distracted from the substance of what is being read by the process of taking the notes. A listing of potential issues will include most of the record references necessary to research and write the issues, and will aid the attorney in seeing the interconnections between the issues in the case.

The disadvantages of issue-related notes must also be recognized. The most important is the danger of relying on the initial listing of issues as the outside range of the substance of the appeal. Even the most experienced appellate counsel will not spot all of the issues in every case in a first reading. Attorneys should take care always to be on the lookout for additional issues through all stages of the appeal, and should never reject the possibility that an arguable issue exists solely because the issue does not appear on the initial listing. The initial notes are a starting point, not a limitation on the possible grounds for relief.

A second disadvantage of issue notes is that some degree of rereading is necessary in

order to prepare a comprehensive statement of facts. This disadvantage is mainly a time factor consideration. On the other hand, this disadvantage in time may often be turned into an advantage on substance. A rereading of all or major portions of the transcript at a later point in the preparation of the appeal may result in discovery of previously unrecognized factual support for an argument. Where the legal research, and possibly even the writing of the legal arguments, has already been done, a rereading of the record is a beneficial check on the context of the asserted errors.

A final word of caution applies to both methods of note-taking. Regardless of which method is used in a particular case, avoid reliance on the notes to the exclusion of the actual record. Attorneys tend subconsciously to interpret a record to their advantage while taking notes, especially when faced with the degree of disturbing and inflammatory evidence presented in many serious criminal prosecutions. No matter how carefully taken, notes are at most an aid to the attorney's work with the record, and not a substitute for that record. Remember, the Court which will decide the case will work from the actual record, not from your notes.

III. ISSUE IDENTIFICATION

As indicated above, issue spotting is the most critical aspect of handling an appeal. Without recognition of the potential arguments in the case, the most adept researcher, most persuasive writer, or most formidable courtroom advocate will have no framework upon which to exercise those skills. Development of good issue spotting skills is the major factor in successfully representing clients before appellate courts.

In relation to issue spotting, as with most other aspects of legal practice, there is no substitute for experience and knowledge of the law. While some potential issues may present themselves clearly to even a novice attorney or law student, many other issues are not so evident on the record. Development of new or innovative issues requires the legal background and breadth of information to recognize a problem area and formulate a solution. One purpose of this manual is to highlight particular areas of a record which may give rise to issues of arguable merit. On a more general basis, appellate counsel should strive to master the basics of good issue identification techniques.

Attorneys must develop the general background and depth of knowledge necessary to identify appellate issues. Many references are available to assist the practitioner. These include the Defender Trial Book, the various MAACS manuals, the Criminal Jury Instructions and annotations, and a large variety of criminal law casebooks and treatises. Counsel should become familiar with the Michigan penal code, the various statutes on criminal and trial procedure, the Michigan Court Rules, and the Michigan Sentencing Guidelines. Knowledge of how the criminal justice system is designed to work is the first step in recognizing when the system fails.

It is critical for appellate counsel to stay as current as possible on Michigan and United States Supreme Court law, and, as time permits, federal caselaw. Keeping current can involve actual reading of newly issued opinions, or regular reading of one or more of the publication that contain summaries of recent decisions – such as the Criminal Defense Newsletter, Lawyer's Weekly, the State Bar Criminal Law Section Newsletter, the Michigan Bar Journal, or other publications. In addition to case summaries, many of these periodicals have articles and pointers

on legal issues or advocacy skills.

Staying current with new decisions not only informs appellate counsel of the changes in substantive law, but also is a valuable guide to how other counsel raise and formulate issues, and how the courts make their decisions. Knowledge of "hot" areas of law, arising from new legislation or the interpretation of new court doctrines, puts appellate counsel on the alert to look for these issues in future cases. Keeping abreast of issues pending in the Michigan Supreme Court and the United States Supreme Court will allow counsel to preserve issues in the lower courts for potential retroactive application of new decisions.

Appellate counsel should try to develop a network of other attorneys for discussing ideas and getting input. Often a second or third opinion on a particular fact situation is very helpful in deciding how an issue can best be presented, or whether it should be presented at all. Attorneys with different outlooks and different experiences will come up with various approaches to obtaining relief. A key to appellate practice is obtaining information. Assigned counsel should take advantage of every source of information available to them, such as the Legal Resources Project at the State Appellate Defender Office, MAACS training programs, Criminal Defense Attorneys of Michigan (CDAM) training seminars, and presentations by local bar associations or defense counsel organizations.

IV. DEVELOPING A THEORY FOR THE CASE

In approaching a new file, appellate counsel should begin the process of developing a theory for the appeal. Just as an experienced trial attorney will work up a theme for the presentation of the case, appellate counsel should, where available based on the record, formulate a cohesive plan for presentation of the issues. Appellate courts that are resistant to granting relief in criminal cases will tend to deal with issues individually, picking them off one by one without express regard for any cumulative effect of the asserted errors. It is counsel's job to remind the court constantly that each issue cannot be fairly viewed in isolation from the remaining claims. The best way to accomplish this result is to look for a theory while initially spotting the issues.

Since the goal of issue spotting is to locate prejudicial errors, not just technical ones, it is most effective to concentrate the issue spotting on that evidence that most contributed to the client's conviction and/or sentence. The chances of getting substantive relief, rather than a finding of harmless error, are obviously increased where the error concerns evidence that can be argued to have had a significant impact on the finder of fact. To this end, counsel should always evaluate what the key pieces of prosecution evidence were, and whether efforts were made to keep that evidence out of the trial. If efforts were made, either by way of suppression motions, objections, or other methods, counsel should consider whether the trial attorney argued the best or the complete grounds for exclusion. If no efforts were made to exclude this evidence, counsel should evaluate whether, given knowledge of the rest of the record, grounds which had a reasonable chance of success should have been raised. Counsel should also consider if the evidence was admitted only for a special or limited purpose, and, if so, whether it was correctly presented to the jury for that purpose.

The same sort of analysis must be applied to the evidence which favored the defense in

the trial court. Counsel should carefully look to see if this evidence was improperly excluded, whether the evidence went to the jury in a correct fashion, and whether evidence existed which the trial attorney made no attempt to introduce.

By looking at the crucial evidence on both sides of the case, appellate counsel can focus on the key factual and legal issues which were resolved in the trial court. This focus can, in turn, lead to development of the theme for the appeal. For example, if the real factual dispute at the trial was the identity of the perpetrator, rather than whether the offense actually occurred, appellate counsel can tie together issues that impacted on the identification question (e.g. failure to suppress suggestive lineups, misstatement of alibi instruction, invalid search which led to discovery of evidence linking the accused to the crime). The overall theme of the appeal – that the likelihood of misidentification of the accused was increased by each of these claimed errors – can then be emphasized within the arguments on each issue, reinforcing the concept that the errors worked together to deny the client a fair trial.

Certainly not all records will present good opportunities for developing a general theme and tying several issues together to punctuate that theme. Where only one or a few issues are available, the issues may not deal with a common concern. In those situations, appellate counsel's responsibility is to put the issue(s) into the context of the entire case, and to explain why even a single or isolated error demands substantive relief.

V. PRESERVATION OF ISSUES

When seeking to identify issues, the appellate attorney must note not only the substance of the potential claim, but also whether the trial attorney adequately preserved the issue for appeal. Appellate counsel should note the type of preservation used (e.g. objection, pre-trial motion, motion in limine, motion for mistrial, request for instruction), and the timing of the trial counsel's action. Appellate courts are particularly alert to the question of preservation of issues. See MCR 7.212(C)(7), requiring statements in the argument portions of the brief identifying where the issues were preserved for review. An appellate court's main role is reviewing decisions made by trial judges. Where through inaction by the parties a particular issue is not raised before the trial court, and thus no decision is made by the trial judge in resolving the issue, appellate judges are naturally reluctant to find prejudicial error. Depending on the nature of the error alleged, appellate review may be completely barred if the issue was not preserved.

While recognizing the importance of timely preservation of issues for appeal, appellate counsel should never fall into the trap of only reading a record to look for objections or preserved issues. An assumption cannot be made that even the most experienced trial attorney adequately preserved all the potential issues. Trial attorneys in many instances will not place objections on the record for reasons of trial strategy, or may raise objections in chambers which are not later repeated for the record. In the stressful atmosphere of a criminal trial, events may not be recognized as constituting prejudicial error, even though they can be readily identified during the more contemplative process of appellate issue spotting. While certainly the existence of an objection or motion signals the potential of an appellate issue, the lack of an objection does not foreclose all possibility of appellate review. In addition, the grounds raised in the trial court in support of an objection or motion do not necessarily limit appellate counsel to arguing only those reasons for granting relief. Appellate counsel has a duty to the client to exercise independent

judgment on how best to present an issue to the reviewing court, even where that judgment diverges from the strategic or legal positions taken in the trial court.

If no timely preservation of an issue is evident on the record, appellate counsel must consider how the potential issue might be raised. Arguments can be made under a plain error theory, or by demonstrating from the record that due to specific circumstances an objection would have been useless. Appellate counsel must also consider the option of asserting ineffective assistance of trial counsel, particularly where a strong argument can be made that absent the failure to object, the client would be entitled to relief. See Minimum Standard 10, discussed above.

Appellate counsel must further consider the potential of making a motion in the trial court, under MCR 7.208(B), or a timely motion to remand in the Court of Appeals, pursuant to MCR 7.211(C)(1), to request an evidentiary hearing or an opportunity to obtain a trial court ruling in order to preserve an issue for full appellate review. In many instances such a motion is necessary if the particular issue was not adequately raised in the trial court. For example, see People v Ginther, 390 Mich 436 (1973) (ineffective assistance); People v Pearson, 404 Mich 698 (1979) (prosecutorial diligence in locating essential witnesses); People v Matthews, 53 Mich App 232 (1974) (verdict against great weight of the evidence); People v Mack, 112 Mich App 605 (1981) (newly discovered evidence); People v Talley, 410 Mich 378 (1981) (Fourth Amendment claims). See also Minimum Standard 8, which states that counsel "shall move for and conduct such evidentiary hearings as may be required to create or supplement a record for review of any claim of error not adequately supported by existing records which he or she believes to be meritorious."

VI. HARMLESS ERROR

While identifying issues appellate counsel must always evaluate whether an asserted error will realistically provide a chance of relief for the client. Along with a lack of objection, one of the appellate courts' most frequent bases for affirming is harmless error. The need to determine whether an error is prejudicial or harmless demands that the full record be carefully read and understood. Successful appellate practice is not a contest to see how many issues can be spotted and raised. Success in gaining relief for the client is the measure of representation that matters most. Attorneys rarely have the time or resources to spend on the research or development of issues that are manifestly harmless within the context of a particular case.

The term "harmless," of course, refers to a situation where, because no unfairness occurred on the particular facts of the case, the reviewing court will not grant relief even if the claim of legal error is upheld. See MCR 6.508(D)(3)(b); People v Mateo, 453 Mich 203 (1996). The standards for harmless error in Michigan have gone through significant changes in the past year. Although the Supreme Court established a harmless error standard for non-constitutional error in People v Gearns, 457 Mich 170 (1998), the Court overruled the Gearns opinion just a year later. In People v Lukity, 460 Mich 484 (1999), the Court held the standard for a preserved, non-constitutional error is that the appellant must demonstrate it is "more probable than not" the error was outcome determinative. The standard for preserved constitutional errors continues to be that stated in Mateo and Chapman v California, 386 US 18; 87 S Ct 824; 17 L Ed 2d 705 (1967), that such error demands reversal unless shown to be harmless beyond a reasonable doubt.

In People v Carines, 460 Mich 750 (1999), the Supreme Court held that non-preserved constitutional error is to be evaluated under the same standard as non-preserved non-constitutional error. See People v Grant, 445 Mich 535 (1994). That standard is the plain error test, which requires the appellant to demonstrate that the error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of the judicial proceedings. (Note: a chart of the harmless error standard for each type of error is included as an appendix to the Carines majority opinion).

The need to raise novel issues that may have only a minimal chance of success, as discussed previously, is not negated by a harmless error analysis. With those issues, the intent is to get the appellate court to accept a legal theory which, if accepted, will lead to relief.

The Minimum Standards require the attorney to raise all issues of "arguable merit" that might actually benefit the defendant. While attorneys should err on the side of raising the issue if the question of arguable merit is close, each potential issue should be subjected to a harmless error analysis before substantial time is invested in its research or writing. If it is likely that the prosecution will argue harmless error in response, counsel should write the issue explaining why the court should find the error to be prejudicial.

VII. SOURCES OF ISSUES OTHER THAN THE RECORD

While the majority of appellate issues are identified from the trial court record, counsel's responsibility for spotting issues is not limited to reading that record. Several other sources of issues must also be investigated. See Minimum Standard 7, which requires counsel to "investigate potentially meritorious claims of error not reflected in the trial record" whenever counsel has reason to believe such a claim may exist.

Minimum Standard 3 reads as follows:

> "Except in extraordinary circumstances, counsel shall interview the defendant in person on at least one occasion during the initial stages of representation."

The client interview, besides forming the basis for a successful attorney-client relationship, is a valuable source of potential issues. The attorney should ask the client if there were any off-the-record events which may lead to issues. Such events might include meetings with trial counsel in which potential witnesses or defense theories were discussed, disputes over trial strategies, knowledge as to particular jurors, and a host of other topics. Many issues which require requests for remand start off with information received from the client.

On the other hand, counsel should also inquire at the client interview about any potentially damaging or harmful information that could come out at an evidentiary hearing, or which could be used to the client's detriment at a resentencing (e.g. new charges or convictions, misconduct while incarcerated). Full knowledge of the facts is essential to an informed decision on whether a particular issue should be run, or whether it presents a significant risk to the client. Counsel should pay particular attention to Minimum Standard 4, which requires counsel to inform the client of the potential risks and foreseeable consequences of raising certain issues. In many cases,

particularly where the conviction was from a guilty plea, accurate advice on the risks from appealing is one of the most crucial obligations of appellate counsel.

In addition to inquiry into particular events, the client should be asked if there was anything about the case not already discussed that the client feels was not done fairly or correctly. Many clients have a strong innate sense of fair procedure. Others are well-versed in the law. Attorneys should not let their professional pride stand in the way of being shown a potential issue by the client that the attorney had not yet identified.

A corollary to client contact is communication with trial counsel. Off-the-record matters can be discussed, as well as insights from the trial attorney as to why the trial judge may have made particular rulings or why evidence was presented in a certain manner. Active cooperation from trial counsel can be quite beneficial to the appeal, for substantive input as well as access to documents, transcripts, and other materials. Appellate counsel should not hesitate to question trial counsel on why particular actions were or were not taken. What appears from the transcript to be an issue of ineffective assistance may change dramatically upon information received from the trial attorney.

In addition to the particular trial court record, appellate counsel has other written sources of potential issues. The attorney should read the relevant penal statutes involved, and go through the annotated cases in the statute books, especially if previously unfamiliar with the specific offense. This review will clarify whether there was sufficient evidence on the essential elements of the offense, and will reveal the types of issues other attorneys raise concerning this offense. In connection with a reading of the statute, the attorney may wish to read the Standard Criminal Jury Instructions for that offense, with the accompanying commentaries. A working knowledge of the basic jury instructions is a good background for issue spotting, both as to instructional error and as a guide to judicial rulings in the case. Finally, all appellate attorneys should be familiar with how the sentencing guidelines operate, and what information must be included in presentence reports. A good practice is to recalculate the guidelines scoring on your own, in order to reveal possible scoring errors that were not raised by the trial attorney.

At the most basic level, appellate counsel should not discount a gut feeling that something was done wrong. If a particular event or decision strikes the attorney as unfair, prejudicial, or illogical, the chances are good that a concrete issue can be developed. Issues of first impression are often the most interesting to work on and argue. In searching for issues, no limitations should be placed on innovation or creativity.

CHAPTER TWO

ISSUE SPOTTING IN A MICHIGAN CRIMINAL RECORD

I. OVERVIEW

The remainder of this manual will be devoted to a discussion of where commonly found issues under Michigan and Federal law appear in criminal records. The discussion will be supplemented with references to lead cases, court rules, statutes, and other authority. As indicated previously, this manual is not meant to be an all-inclusive listing of potential issues, or an exhaustive review of precedent. It is instead intended to give appellate counsel a broad checklist of areas in the record where particular issues arise, and a starting point for research. The discussion will follow the format of the chronological method of reading a record.

Although it is now ten years old, a study conducted by the National Center for State Courts provides some interesting background. Researchers looked at the pattern of dispositions of criminal appeals from appellate courts in California, Colorado, Illinois, Maryland, and Rhode Island. The survey found that the affirmance rates among the five courts were very similar, with an average of 79.4% affirmances. Reversals and dismissals accounted for only 1.9% of the cases, reversals and remands for new trials 6.6%, remands for resentencings 7.3%, and other relief (reversals of less than all convictions in a multi-count case, etc), occurred in 4.8% of the cases. Understanding Reversible Error in Criminal Appeals, National Center for State Courts, 1989.

The survey also looked at what substantive issues led to reversals (excluding sentencing issues), and the "success rate" of particular issues, measured by the frequency with which the issue was successful as compared to the number of times the issue was raised. The survey's findings are reproduced below:

Reversible Error by Issue

Issue	Percentage of all Error Associated with Issue	Success Rate
Admission/exclusion of evidence	20.6%	7.7%
Instructions	13.5	9.7
Procedural or discretionary ruling	13.1	7.8
Sufficiency of the evidence	12.0	5.8
Merger of offenses	10.5	51.9

Suppression of evidence, statements, or identification	10.5	8.4
Ineffective assistance/ waiver of counsel	6.0	12.9
Other constitutional claims (double jeopardy, speedy trial)	4.9	11.5
Jury selection or deliberation	3.4	8.8
Statutory interpretation or application	2.2	19.4
Plea	2.2	15.0
Prosecutorial misconduct	1.1	1.9

The survey concluded that most cases of reversible error occur in three broad categories. The first is where an issue is raised during the proceedings, such as where an objection is made to evidence during the examination of a witness and an immediate decision is made, as compared to decisions on pre-trial motions where the trial judge has more time to research and contemplate the question. The second is where new laws or procedures are interpreted in the trial courts. The third is where the error is based on the particular trial judge's failure to follow an established procedure or rule, as compared to a problem with the procedure or rule itself.

These findings should be kept in mind regarding both the general techniques of issue presentation, such as developing a theme for the appeal and concentrating on the key evidence in the case, and the specific areas of law to be discussed. While the overall affirmance rates are not encouraging (and are probably even higher today), the issue chart shows that effective identification and presentation of claims of error can result in relief being granted with some frequency.

II. CHARGING DOCUMENTS IN THE TRIAL COURT FILE

Meritorious issues are rarely found solely on the face of the charging documents, such as the complaint, warrant, return on the examination, and the information. Most of these documents are by now fairly standardized, and provide only the most basic information in a repetitive fashion. The documents are crucial, however, to several areas of potential error.

A. Timing of the Charges

Appellate counsel should always look at how long it took the prosecution to bring the

CHAPTER THREE

TOP TEN LIST OF NON-ISSUES

This manual has been designed to provide a framework for spotting and identifying issues of arguable merit in a criminal record. As a final point, it should be noted that much of appellate counsel's work in dealing directly with clients involves explaining why certain situations do not raise arguable issues. Such discussions can be time-consuming, aggravating, and disruptive of the attorney-client relationship. With these facts in mind, the author surveyed numerous experienced appellate attorneys for the most common areas about which clients make inquiries or harbor (mis)conceptions of the law that rarely, if ever, result in good issues. In hopes that this compilation will aid both attorneys and clients in resolving these questions with a minimal amount of stress and expenditure of time and research, the following is the top ten list of non-issues:

1. "The police did not read me my Miranda rights" (but no admission or confession was obtained or admitted): Contrary to popular belief, buttressed by years of television police and lawyer shows, there is no absolute duty on the police to read Miranda rights to all arrested suspects. Compliance with Miranda is only required for admission of a statement taken pursuant to custodial interrogation.

2. "The prosecution refused to give me/the complainant/the witness a polygraph test": Not only are polygraph results inadmissible at trial, no requirement exists under Michigan law for the police to test their witnesses or comply with a defense demand for a polygraph.

3. "My attorney didn't do a good job/was in a conspiracy with the prosecution to get me/etc": While ineffective assistance of counsel can be a good issue, it must be based on a specific error or omission, rather than only general dissatisfaction with the attorney or with the result. The fact that trial counsel was friendly with the prosecutor or judge does not prove a conspiracy existed. Similarly, the fact that the attorney was appointed by the court and paid by the State does not make trial counsel a coemployee of the prosecution.

4. "The prosecutor didn't offer me a good plea deal/my attorney didn't get me a good plea offer": There is no obligation on the prosecution to offer a plea agreement, either in terms of a charge reduction or sentence agreement. While the volume of cases generally calls for pleas in most situations, there is no right to plead guilty in exchange for some concession. Complaints against the trial attorney on this question are similar to #3 above – the attorney has no general power to demand a favorable offer. Plea negotiation is a difficult and critical skill, but not a matter of right.

5. "I just want a time cut": There is no authority in Michigan for a trial judge to reduce the term of a lawfully imposed prison sentence, even if the defendant has a good record and there are other equitable facts. The appellate counsel must find some legal grounds for a resentencing before the judge can impose a new or different sentence.

6. "There was no medical testimony that sexual intercourse occurred": There is no requirement under Michigan law that the testimony of a complainant in a CSC case be corroborated by any testimony, including medical testimony.

7. "All of the prosecution witnesses lied": The appellate courts do not sit as a new jury, redeciding questions of credibility. While it is the duty of appellate counsel to point out the weaknesses and contradictions in the prosecution's case, in order to argue for prejudicial error, straightforward attacks on the accuracy of the testimony without something else are a waste of time.

8. "The police planted the stolen property at my house/got my fingerprints from somewhere else and placed them on the property/etc": While it cannot be stated that no persons have ever been framed by the police, it is hard to conclude that it happens as often as clients insist and harder still to prove.

9. "There wasn't probable cause for my arrest" (but no evidence flowed from the arrest): As with the Miranda issue, there is only error where there is something to suppress. An illegal arrest per se does not divest the court of jurisdiction over the person. If no evidence was seized, identification procedures employed, or statements taken that can be argued are fruits of the illegal arrest, the lack of probable cause is by itself a non-issue.

10. "I didn't know you couldn't have a sawed-off shotgun/she looked like she was older than fourteen, etc": Ignorance of the law or facts is generally no excuse. This concept applies both to criminal defendants and to their attorneys.