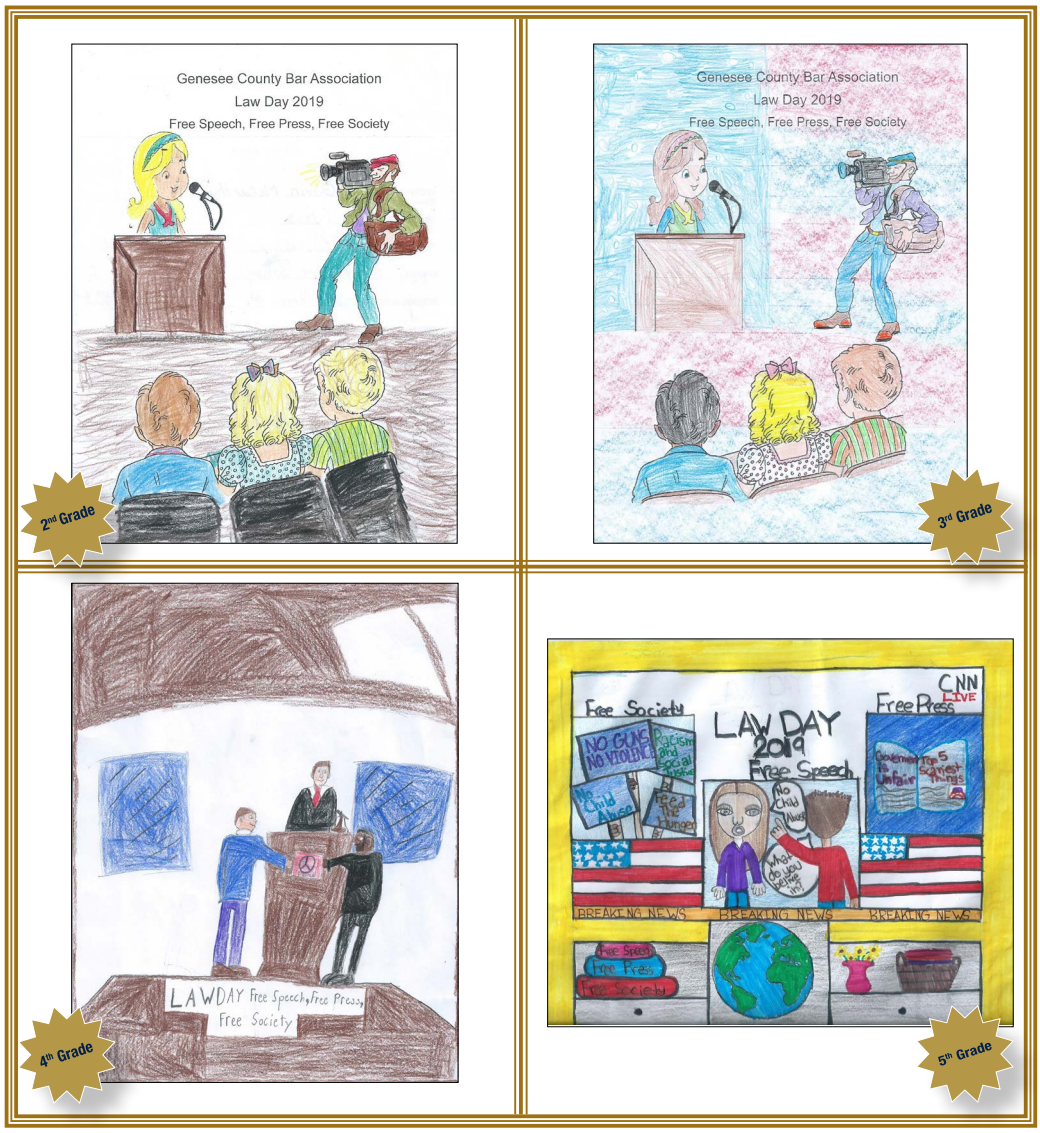
March/April 2019

BAR BEAT

Genesee County Bar Association



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Advertisers

Membership Benefits 101

By Jessica J. Hammon, President

Jessica J. Hammon

The Genesee County Bar Association, its staff, and the board of directors, are all here for the primary purpose of serving the members of our organization. Sometimes I think this very simple fact gets lost in the hullabaloo of our busy lives. As a member, you are entitled to many benefits and, frankly, everything we do as your leadership is geared toward how it will help you. When a proposal comes our way the first question is always "how will this benefit our membership?" Allow me to give you a few examples of the benefits available to you of which you may be unaware:

Neithercut Conference Room – Our conference room seats 10-12 people and is free to members to use for meetings, depositions, mediations, etc. Just call the GCBA staff to schedule your time.

LawPay – the GCBA has partnered with LawPay to provide members with special offers on their credit card processing fees. If your office does not accept credit cards yet, this is a great way to add an additional valuable service to your clients at a discounted rate to you.

UofM Flint Recreation Center – You can get a discount on member rates for you and your family.

Sam's Club – Employees/members will receive a welcome package when they sign-up for a new membership or renew an existing membership.

Lawyer Referral – For a small fee the GCBA will direct referrals in your area of practice to your office.

Mailing Labels – Moving? Offering services in a new area of practice? Only members can purchase mailing labels for the entire GCBA membership at a very reasonable rate.

These are just a few of the perks that you have as a GCBA member, and they aren't even the really important ones. **Educational event**s are offered year-round covering a variety of topics. **Monthly luncheons, membership meetings, seminars** – all of these events are offered to you at an extremely reasonable rate and are discounted from the general public rate. Some of these events even qualify for your CLE requirements. The Bar Foundation and Neithercut fund are now also offering **reimbursement** for ICLE seminars and certificates, up to $300.00 per year for many of our members! **Networking** opportunities abound at the GCBA and have truly been a significant help to me in my career and in getting to know my fellow attorneys. The **Barristers' Ball** and **golf outing** are great ways to just come and have some fun with other members. And small known fact – you don't have to golf to come to the golf outing, just pay for a dinner ticket and come eat with us! Finally, we always provide our members with ways to **give back** to the community, as I've written about this topic before. You know it's close to my heart. The **Holiday Dinner, Soup Kitchen days, Ask the Lawyer, Law Day**, and the two

main social events listed above all either focus on, or have elements of, giving back to our greater community.

So please, contact our wonderful hard-working staff at the GCBA office and talk to them about the above benefits – taking advantage of even a fraction of these is sure to improve your practice and you as a person! Have an idea for a membership benefit you'd like to see offered? Give me or the staff a call; we are always striving to improve your Genesee County Bar Association.

What is a U.S. Patent Anyway?

By Hon. Brian Pickell

Hon. Brian Pickell

Patents, trademarks, copyrights, and trade secrets all fall under the umbrella of intellectual property. With respect to patents in particular, they find their constitutional basis in this country in Article 1, Section 8, Clause 8 of the U.S. Constitution: "The Congress shall have the power to promote the progress of science . . . by securing for limited times . . . for the inventors the exclusive right to their respective . . . discoveries."

A U.S. patent is essentially a contract between an inventor and the general public, whereby, in exchange for the inventor's disclosing to the public the best way known to her/him for making and using the invention claimed in the patent, the federal government grants the inventor for a definite period of time the right to exclude others from making, using, selling, and offering for sale in this country the invention and also importing it into this country (i.e., practicing the patented invention).

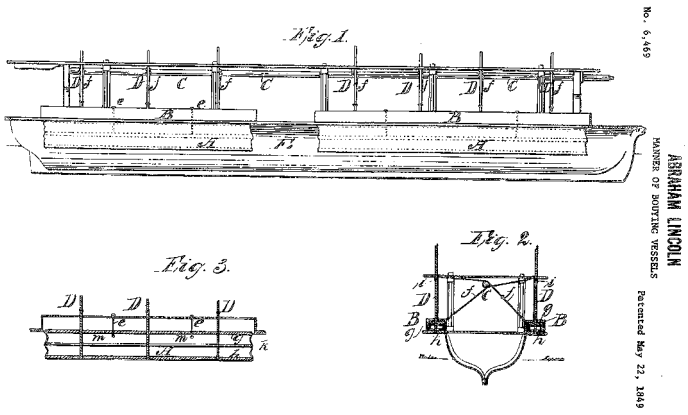
Interestingly, notice here the patent right does NOT necessarily allow the inventor to legally practice her/his own invention . . . rather, the patent right merely allows the inventor to exclude others from doing so. In a weird way, then, the inventor can actually commit patent infringement just by practicing her/his own invention. More specifically, if the invention is merely an improvement of an underlying idea subject to a valid and enforceable patent, then the inventor CANNOT legally practice the invention without authorization for her/him to do so by way of assignment or license from the owner of the underlying patent (this assumes, of course, the improvement CANNOT be practiced independently of the underlying idea). In contrast, if the invention is a "pioneer" invention or an improvement of an underlying idea NOT subject to such a patent, then the inventor can legally practice the invention (including any underlying idea).

In the United States, only certain subject matter is patentable . . . namely, any new and useful process, machine, article of manufacture, or composition of matter or any new and useful improvement thereof. Accordingly, an invention can be biotech, chemical, electrical, mechanical,

software, or even a business method, just to name a few general categories of invention. With that said, however, to be patentable in this country, the invention must still satisfy at least three more requirements . . . it must be new, useful, and "unobvious" (i.e., "a big enough deal," so to speak, to a person having ordinary skill in the technology to which the invention pertains).

A U.S. patent protects rights only in the United States. Also, the term of a U.S. patent is twenty years from the "effective" date of filing with the U.S. Patent and Trademark Office [USPTO (headquartered in Alexandria, Virginia)] of the U.S. patent application that ultimately issues into the patent. In this regard, such an application is generally pending with the USPTO for two to four years. Furthermore, a U.S. "design" patent protects the ornamental appearance of an article of manufacture and a U.S. "plant" patent protects new varieties of plants; however, a "regular utility" patent is by far the most common type of U.S. patent issued by the USPTO.

With the above in mind, the first U.S. patent was issued on July 13, 1836 for traction wheels, and milestone U.S. Patent 10,000,000 was issued on June 19, 2018 for coherent LADAR using intra-pixel quadrature detection. Wow . . . what a long way we've come! Contrary to what many may believe, inventors do NOT sit in a waiting room of the USPTO holding their respective inventions on their laps. More realistically, unfortunately, the journey through the USPTO is a legal and technical labyrinth. As such, if you have a client who

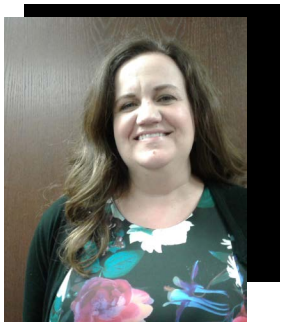


"The patent system added the fuel of interest to the fire of genius." – Abraham Lincoln [the only U.S. president granted a U.S. patent (a copy of the first page of which is seen above)]

is looking for your assistance in protecting any rights s/he may have in an invention, prudently direct the client to hire a registered patent attorney or agent to transform her/his invention into a formal U.S. patent application. The attorney or agent is trained to help inventors navigate the legal and technical requirements for preparing the application and filing and prosecuting it with the USPTO. The inventor who so hires generally finds the journey through the patenting process easier than the inventor who chooses to prepare, file, and prosecute her/his own application.

Parenting Time Versus Custody Modifications

By Ariana Heath



Ariana Heath

Modifications to custody are guided by *Vodvarka v Grasmeyer*, 259 Mich App 499 (2003). Parenting time modifications, however, are guided by *Shade v Wright*, 291 Mich App 17 (2010), where the court said:

> "Such criteria does not exist, however, when a modification of parenting time does not alter the established custodial environment because determinations regarding child custody and parenting time serve different purposes. Whereas the primary concern in child custody determinations is the stability of the child's environment and avoidance of unwanted and disruptive custody changes, *the focus of parenting time is to foster a strong relationship between the child and the child's parents*… with our holding today, we do not seek to precisely define the proper cause or change in circumstances necessary to change parenting time. Our holding is limited to our conclusion that the normal life changes that occurred with the minor child in this case are sufficient to modify parenting time." (Emphasis added).

The focus of a parenting time modification should be on the child's best interest and fostering a strong relationship between the child and the parent.

Another issue in terms of parenting time modifications is the burden of proof. In *Pierron v Pierron*, 486 Mich 81 (2010), the Michigan Supreme Court held that if a modification in parenting time does not change the child's established custodial environment, the parenting time modification must be supported by a preponderance of the evidence. If the modification requested does not alter the established custodial environment, it is (1) more likely to be a true parenting time request, not custody, and (2) the burden of proof is a preponderance of the evidence rather than clear and convincing evidence. As always, the focus is on what is in the best interest of the child.

The focus of a parenting time modification should be on the child's best interest and fostering a strong relationship between the child and the parent. While *Vodvarka* is more concerned with preventing interruptions to the child's normal life and routine without just cause, *Shade* looks at what has and will continue to foster a strong relationship between parent and child. Normal life changes (for both parent and child) can be a reason to modify parenting time.

Case law indicates the following situations are reasons to look at modifying parenting time: remarriage of a parent, increase in homework and extracurricular activities, physical relocation closer to the child, completion of court ordered conditions, a significant move by one parent, change in employment that renders the current schedule unsuitable, and the child growing older.

Some modifications do not require a threshold hearing. If the parties have joint legal custody and cannot agree on a major life decision for the child, such as where the child should attend school, the court should automatically conduct a hearing to determine what is in the child's best interest.

If the question is whether it is a custody or parenting time modification, the following questions may be helpful:

- What is the change in the number of overnights if the request is granted?
- How old was the child when the last order was entered?
- Does the change primarily affect the parent or does it affect the parent and the child?

The focus of parenting time is to foster a strong relationship between the child and the parent. If the current parenting time schedule does not allow a parent quality time with the child, the focus in a modification motion should be on how the *change* will allow the parent and child to foster a stronger *relationship*.

Motions should indicate how the current schedule is untenable and why it isn't fostering a strong relationship between the parent and child. Often, the court sees orders that were entered to suit the needs of the immediate situation and, as a child ages, the order no longer serves the needs of the parents or the child. To avoid this situation, long-term planning may need to be addressed to anticipate issues such as a child beginning school or a child simply growing older. What is appropriate for a two-year-old often will not work for a ten-year-old.

In summary, motions for parenting time modifications should focus on the relationship between the child and the parent and how the proposed modification will strengthen the bond between the two. The proper cause or change in circumstance need not be as significant as for a custody modification and normal life changes are often a sufficient basis to modify parenting time.

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Free Speech, Free Press, Free Society!
Law Day 2019

By Sherri L. Belknap

Sherri L. Belknap

Adopted in 1791, the First Amendment to the U.S. Constitution protects the freedom of speech and the freedom of the press. It provides Americans with the basic right to express themselves without fear of government interference. Since its adoption, the United States Supreme Court has decided many cases in order to determine limits to the freedom of speech and the press.

For example, in 1971, the U.S. Supreme Court determined that the Washington Post and the New York Times could publish contents of the Pentagon Papers involving a top-secret Department of Defense study about U.S. political involvement and military involvement in Vietnam. In 2017, "The Post" starring Meryl Streep and Tom Hanks brought this case to life.

Now, Law Day honors the First Amendment and continues to further discussion and education on the limits, if any, that should be given to our rights to speech and the press. Our coloring poster contest for 2nd, 3rd, 4th, and 5th grades will be on display at the Flint Public Library during the month of May.

Did You Know?
Legalized Marijuana and the Workplace

By Linda Graham

Linda Graham

The legalization of recreational marijuana in Michigan does not affect an employer's right to demand a drug-free workplace. The Michigan Regulation and Taxation of Marihuana Act (MRTMA) specifically states that an employer may refuse to hire an applicant testing positive for marijuana. The Act also allows employers to discipline or discharge employees who violate drug free workplace policies or work under the influence of marijuana. Therefore, employers can continue to enforce drug testing policies for employees and new hires.

Michigan employers should have a written policy that puts applicants and employees on notice of its workplace drug rules. Such policies should state the rule prohibiting the use of or being under the influence of marijuana in the workplace, reasons for testing (pre-employment/reasonable suspicion/random/post-accident), testing procedures and consequences for violations.

Editor's Note: *The spelling of marijuana can be either with a "j" or an "h". While both are acceptable the law was written with an "h" and current common spelling is with a "j."*

Paid Medical Leave Act Now a Reality: An Employee Benefit or Empty Promise?

By Gregory M. Meihn

Gregory M. Meihn

On December 14, 2018, Michigan Governor Rick Snyder signed into law the Paid Medical Leave Act, Public Act No. 369 of 2018 ("PMLA" or " new Act"), which substantially amends the Earned Sick Time Act No 338 that had passed the Legislature in September 2018. The revisions contained in the new Act restrict the paid leave mandate to significantly fewer employers than were subject to the original law, and greatly reduce the number of paid leave hours an "*eligible*" employee can accrue.

PMLA is set to begin on March 29, 2019

The PMLA defines "employer" as "any person, firm, business, educational institution, nonprofit agency, corporation, limited liability company, government entity, or other entity that *employs 50 or more individuals*." Employer does not include the United States government, another state, or a political subdivision of another state. In other words, unlike its predecessor, the PMLA does not apply to companies *having less than 50 employees*. (Emphasis added)

"Eligible" employee means *"…an individual engaged in service to an employer in the business of the employer and from whom an employer is required to withhold for federal income tax purposes."* In other words, "eligible" employees include *part-time and full-time* employees.

However, even if an employer is required to provide benefits under the law, *not all employees are eligible to receive them under the new Act.* Seasonal workers, part time workers (who worked fewer than 25 hours per week on average the preceding calendar year), and variable hour workers are exempt. Union employees with current CBAs will become eligible once the recent contract expires.

PMLA provides that an "eligible" employee "must accrue paid medical leave at a rate *of at least* <u>*one hour*</u> of paid medical leave for every <u>*35 hours worked.*</u> "Eligible" *employees begin earning paid medical leave* <u>*immediately on their first day of work*</u>. Further, the PMLA does not affect other benefits provided by the employer that may not start until after the typical 90-day probationary period.

Under the new Act, an employer **may** limit an "eligible" employee's **accrual** of paid medical leave to 40 hours per benefit year. Further, an Employer may limit carry over of unused and accrued paid medical leave to 40 hours, among other restrictions.

Alternatively, an employer may comply with the new Act by providing at least 40 hours of paid medical leave to "eligible" employee at the beginning of a benefit year—front loaded. If an employer front loads the PMLA, the employer is not required to allow the eligible employee to carry over **any of that paid medical leave** to another benefit year. This is an incentive for employers to front-load the 40 hours of PMLA, thereby eliminating a carryover. Problem with front loading is that the employee may leave before all paid leave has been earned.

The PMLA also provides for a rebuttable presumption that an employer is in compliance with this act if the employer provides at least 40 hours of paid leave to an eligible employee each benefit year. The term "paid leave" is defined in the new Act as including, but not limited to, paid vacation days, paid personal days, and paid time off. So here is the empty promise, at least for full-time employees. While the PMLA compels an employer to provide up to 40 hours (five days) of paid medical leave, most employers will be compliant with the new Act without doing more than what they are doing now because they provide at least five days of paid time off either through vacation, PTO, or other forms of paid time off for their full time employees. It is the new hires and part-time employees that will benefit most by the PMLA.

PMLA also allows employers to restrict how PMLA can be used for specific purposes set forth in the statute. The limitations are worth reading as they target specific types of life events.

PMLA does not require an employer to pay out unused PMLA to the employee at the time of termination, resignation, or layoff.

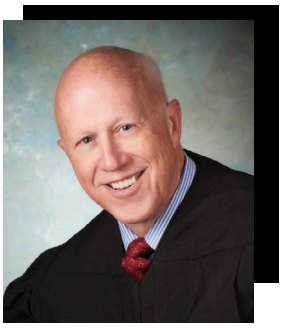
Finally, employers are required to acquire the appropriate poster being developed by the State of Michigan that outlines the amount of paid leave required to be provided, the terms under which paid leave may be used, and the employee's right to file a complaint.

The PMLA is enforced by the Michigan Department of Licensing & Regulatory Affairs. There is no private right of action for violations.

In summary, there is a lot to be done between now and the effective date of the PMLA. If you are an employer of **50 or more** employees—including part-time people—you may need to adjust your policies and provide benefits where previously no benefits were provided.

Winter Mock Trial in Washington, D.C.

By Hon. Geoffrey L. Neithercut



Hon. Geoffrey L. Neithercut

It was my first winter break since leaving the bench, so we took a spontaneous trip to our nation's capital. Fortunately, the government shutdown forced us to be creative when we sought activities. Our research revealed a golden opportunity: the annual mock trial at the Shakespeare Theater Company. The trial was based upon the events that occurred in Shakespeare's Richard III.

Stafford, son of the beheaded Duke of Buckingham, argued the loss of his good name and the confiscation of his property was conducted illegally, and without due process. He believed the decisions were invalid because they were directed by Richard III, a usurper to the throne. Stafford petitioned to restore his good name and lands. Henry VII, who defeated Richard III at Bosworth Field, was opposed to Stafford's request. Let the trial begin!

Both the Counsel for the Petitioner and the Counsel for the Respondent were represented by members of D.C. law firms, who had spent weeks preparing their arguments. The "Supreme Court of England" had a few familiar names on the bench: Justice Samuel A. Alito, Justice Stephen G. Breyer, Judge Merrick B. Garland, Judge Jennifer Walker Elrod (from Texas), and Judge Amy Berman Jackson! We scored seats in the front row of this sold-out improvisational performance. We were riveted to the proceedings.

I have always said a successful lawyer should study judges for idiosyncrasies, preferences, and dispositions. Here was an opportunity to study some of the most powerful justices in our great country. It was immediately apparent they are real people, not just a title. They were clever and they were funny. Justice Alito requested clarification from the Crown regarding red roses vs white roses, whereupon Judge Elrod piped up with a verse from "The Yellow Rose of Texas." Justice Breyer insisted the Crown provide documentation for his facts, to which the lawyer responded, "A source, a source, my kingdom for a source." The Petitioner was in the process of explaining lengthy delays for bringing this action to the court, which elicited Judge Garland's exclamation: "Delays, delays, I understand delays!" Judge Amy Berman Jackson phrased a complicated question about Richard III's legitimacy to a rap she snared from the Broadway hit, "Hamilton." The court also clarified they were not Richard III judges, nor were they Henry VII judges; thus, they were not beholden to any king.

After the arguments concluded, the justices walked off stage to deliberate. A velvet bag was passed through the audience to collect tokens representing their vote for justice: a red token for Stafford, a blue token for the Crown. The tokens were sorted into two bags and dropped onto an actual scale of justice. The scale tipped in Stafford's favor, much to the delight of the audience. Interestingly, the justices voted 4:1 for the Crown. The majority opinion stated due process did not exist at the time of this trial, so the argument was baseless.

The counselors were well prepared, basing their arguments on the fifteenth century English law. The justices were sharp and surprisingly witty. All in all, it was an evening to be remembered.

Barristers Ball

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Making a Record that will Support Your Case on Appeal

By Michael A. Tesner, Managing Assistant Prosecuting Attorney,
Genesee County Prosecutor's Office – Appellate Division

Michael A. Tesner

In preparing appeals, I cannot count the number of times while scouring the trial court record I have sworn inwardly to myself because I know facts exist or a discussion between counsel—sometimes involving the court—occurred in the circuit court but there is no mention of it in the official record. This is problematic in a number of instances, but for purposes of this article, I will leave it at this: *if it is not in the record, it cannot be argued on appeal*. As an appellate attorney, I cannot stress enough the importance of making a good record in the trial court.

> "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," as well as "[t]he substance or transcript of excluded evidence offered at a trial" and related proceedings.[1]

It is axiomatic that an appellant bears the burden of providing the appellate court with a sufficient record to verify the factual basis of their claim.[2] Even a party defending their case on appeal can only refer to facts that are preserved in the record. And absent the appellate court granting a motion to remand—which is rare—"it is impermissible to expand the record on appeal."[3]

How then does one preserve the record for appeal? At the most basic level, the solution is to ensure that everything that occurs in the trial court either occurs in open court or is placed on the record at the next opportunity, preferably with acknowledgement from opposing counsel and the court. More specifically:

- Side-bar conferences should be recorded as part of the record or important content restated on the record outside the jury's presence.
- All significant in-chambers discussions (including at "pre-trial conferences") should be placed on the record outside the presence of the jury.
- Any stipulations between the parties should be in writing—or at least stated on the record in open court.
- All witnesses' gestures should be described for the record, including testimony as to distances—which are often only mentioned as the distance from the witness to a person or object in the courtroom.
- Witnesses should briefly describe the photograph, map, or exhibit they are testifying about.
- Any notations made by a witness on an exhibit should be photographed and admitted into evidence or marked for the record.
- All exhibits and demonstrative evidence referred to on the record should be retained.
- Audio or visual exhibits that are played in court on the record must be documented and maintained in a way that it is clear what was entered into evidence, particularly when part of such evidence was redacted by the parties.

By following these steps, you will make a cleaner, clearer record of what occurs in the trial court which will help you make your best case on appeal.

Endnotes

1 MCR 7.210(A)(1) and (3).

2 *People v Elston*, 462 Mich 751, 762; 614 NW2d 595, 600 (2000).

3 *People v Powell,* 235 Mich App 557, 561 n 4; 599 NW2d 499 (1999).

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