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# **Advanced Topics in Criminal Appellate Law Practice**

**September 21, 2018**

**Ohio Supreme Court Practice**

**Justice Paul Pfeifer (ret.)**

**&**

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**Akron Bar Association CLE**  
**Advanced Issues in Criminal Appellate Law Practice**  
**September 21, 2018**

**Ohio Supreme Court Practice – presenters – Justice Paul Pfeifer (ret.), Professor J. Dean Carro (ret.)**

I. Positioning the case for discretionary review or direct review in the Supreme Court of Ohio.

A. The process must start at the trial court level.

B. Determine the issue for your trial, review Ohio Supreme Court case law on your point.

1. Is there Ohio Supreme Court precedent? If not, why not?

2. If there is Ohio Supreme Court precedent, how old is the case, and are any of the justices or assigned judges on the court presently?

3. Have there been any changes relevant to your issue across the country in the state or federal courts?

4. Assuming there is no Ohio Supreme Court case law what has your Court of Appeals said on the issue and are there differing views within the Ohio appellate courts? In the event there is no Ohio Supreme Court precedent one should consider a motion to certify a conflict between the Courts of Appeals should your case get that far. See S.Ct.Prac.R.5.03 and 8.01; App.R. 25

C. If there is Ohio Supreme Court case law on point on your issue that is against you be sure to preserve the issue you would like to present to the Ohio Supreme Court at the trial court level, and the Court of Appeals level. Even though you will lose at both levels it is critical to preserve the issue for appellate review although there are exceptions to this rule.

D. Examples of negative treatment of your issue.

1. State v. Wilcox, 70 Ohio St.2d 182 (1982) – syllabus paragraph one, Ohio does not recognize the defense of diminished capacity. State v. Thomas, 66 Ohio St. 2d 518(1981), Ohio does not recognize the battered woman syndrome defense, and contrast with State v. Koss, 49 Ohio St.3d 213(1990).

2. States v. Wilcox – consider any new developments on the defense of diminished capacity in insanity plea cases Consider changes in Ohio law. Review Model Penal Code states, review federal court decisions.

3. Thomas/Koss – change in the judicial/academic acceptance of battered woman syndrome testimony, change in the makeup of the court.

II. Preparing your appellate court brief with an eye on appeal to the Supreme Court of Ohio.

A. Craft assignment of error appropriately, recognize candidly the fact of binding Ohio Supreme Court precedent.

B. In developing your brief, position yourself to certify conflict, be sure to adequately describe similar fact patterns and similar issues considered by other Ohio appellate courts. See App.R.25 on certification of conflicts.

### III. Positioning your case for merit review in the Supreme Court of Ohio.

A. Understand the bases for the Court to grant review. Appeals of right S.Ct Prac.R.5.01.

B. Jurisdictional Appeals S.Ct. Prac.R. 5.02. Case involves a substantial constitutional question. A question of public or great general interest. In a felony case, why leave to appeal should be granted. The Court will rarely grant review to remedy an individual justice but rather will consider the relevance of your issue to state wide concerns.

C. The key parts to your memorandum in support of jurisdiction, assuming discretionary review, are your propositions of law and your reasons why review should be granted.

1. Proposition of law should be capable of being used as a syllabus by the Supreme Court of Ohio.

2. Your reasons for granting review should be concise, should address the changes in the law or the changes adopted by other courts or changing circumstances.

D. Drafting your motion to certify conflict. Must be on the same or similar facts and same or similar issue. The cases from other appellate districts on which you seek a conflict certified should be in your appellate brief.

### IV. Discretionary review granted.

A. Review the order granting review and determine which justices voted for review and which justices dissented. The Court follows the rule of four when granting review.

B. Know what the individual justices have written on your issue whether it be in the Supreme Court of Ohio or in the Ohio Appellate courts.

C. Preparing your brief. Consider having an amicus. Anticipate arguments by opposing counsel and address them in your brief in chief. Write as if you understand what the individual justices have written and how the court has evolved on your particular issue

### V. Preparing for oral argument. Consider moot courting your case if you do not have a lot of experience before the Supreme Court of Ohio.

A. If this is your first time arguing in the Ohio Supreme Court go to the Court day the before and grow accustomed to the courtroom. The courtroom itself is quite overwhelming in its beauty and one would be well advised to become accustomed to that. Understand the format for the argument and the fact that you are being filmed. Never, ever, ever look at the camera.

B. Read your briefs, outline your briefs, outline your opponent's brief, reread all of the cases, reread your record and be fully prepared. Remember that the individual justices are generalists and you are a specialist on your case.

C. Do not try to memorize your entire argument but rather have an outline of one or two pages that can be used as a tool not a crutch.

## VI. Presenting oral argument.

A. Arrive early, sign in, get yourself situated in the waiting room, check the decisions issued by the Court that day.

B. Prepare your appellate argument so that the justices understand you relish any questions. The key to modern oral argument is anticipating the questions, developing an answer, and engaging in a dialogue with the justices. The worst argument is the one that has no questions.

C. Accuracy, brevity and clarity. Listen to the questions and do not try to anticipate the Justice's viewpoint based upon the question asked. There can be many reasons why questions are asked. Consider the fact that justices may be having a dialogue between themselves.