

APPELLATE PRACTICE SECTION

November 18, 2005

Farmington Hills, Michigan

Present:

Deb Hebert
Linda Garbarino
Barbara Goldman

Janet Boes
John Bursch [phone]
Mark Cooney
Judith Curtis
Tim Diemer
Terry Flanagan [phone]
Don Fulkerson
Marcia Howe
Anica Letica [phone]
Roz Rochkind
Mary Massaron Ross [phone]
Liisa Speaker
Mike Updike
Vic Valenti
Jill Wheaton

Excused Absences:

Paul Bernard
Megan Cavanagh
Ron Lederman
Gerald Posner

Guests:

Sandra Mengel

- I. Welcome, introductions and call to order. A regular meeting was called to order at 2:10 p.m. Deb Hebert welcomed Tim Diemer to the Council.
- II. Approval of minutes of meeting of October 21, 2005. Two corrections were noted. It was **moved** (Mike Updike) and **seconded** (Liisa Speaker) that the minutes be approved as corrected. *Motion carried (unanimous).*
- III. Treasurer's Report.
See agenda packet.
- IV. Committee Reports.
 - A. Court Liaison/Rule Comment.
 1. Proposed amendment to MCR 7.211(C)(1)(a)(i) (motions to remand). Deb Hebert reported that she spoke with Ron Lederman, who said that the committee had decided to defer to the criminal practitioners on the Council, as the proposal seemed to have the greatest impact on criminal appeals. Deb's feeling, based in part on the comments made via e-mail earlier in the month, was that it would be difficult for the Section to reach a consensus on the proposal. After discussion, it was agreed that Terry Flanagan would write a letter under his own name, opposing the proposed amendment, and the Appellate Practice Section would not offer a comment on it.

2. Possible amendments to MCR 7.211(B)(2)(e) (time to respond to motions in the Court of Appeals) and related matters. Sandra Mengel indicated that the court is considering modifications to MCR 7.211(B)(2)(e), to extend from 7 to 14 days the time for responding to a motion for stay; motion to strike a pleading; motion to file an amicus brief; motion to hold an appeal in abeyance; or motion to reinstate an appeal after involuntary dismissal. It was agreed without motion that the Appellate Practice Section Council supported these proposals.
3. Sandy indicated that the court is also considering adopting a rule that would allow decisions without responses on motions to extend time for ordering transcripts; to extend time for filing briefs; for substitution of counsel; to permit oral argument; and for admission pro hac vice, which typically do not generate a response from the opposing party. It was agreed without motion that the Appellate Practice Section Council supports the proposal in principle but recommends allowing a party who wishes to reply to notify the clerk's office by phone that a response would be filed.
4. The court is beginning to look at ways of making the court rules work for the benefit of practitioners, for example, by simplifying some of the format requirements for briefs. Linda Garbarino suggested formation of a task force.

B. Michigan Court Practice Committee.

1. Court of Appeals "fast-track" docket feedback. Roz Rochkind reported that Megan Cavanagh hopes to have an interim report after December 31, 2005. If the proposed amendments to AO 2004-5 take effect between January 1 and February 1, 2006, she will delay the report to incorporate the additional month.
2. Effect of dismissal without prejudice on finality of order. No developments since October.
3. [Item VI(E).] Appearance forms for the Michigan Court of Appeals. Mary Massaron Ross explained that she would like to see the Court of Appeals adopt an "appearance form" similar to those used by the Sixth Circuit, to facilitate service on the correct attorney when there is more than one counsel for a party or a firm has multiple office locations. Sandra Mengel indicated that the Court of Appeals will already enforce service on a clearly-designated lead counsel. Deb Hebert suggested a court rule amendment, with the adoption of an internal operating procedure in the meantime. Sandy recommended submitting a proposal to Judge Whitbeck, who will refer it to the Court of Appeals' Rules Committee. Vic Valenti said the Court Liaison/Rule Comment Committee will "do something" about it.

C. Publications.

1. Newsletter. Deb Hebert reported that the Section Chairs listserv was not in operation yet, so she had not been able to solicit recommendations for potential editorial/production services. The time-consuming part of doing the newsletter, however, lies in getting the material, not production of the final copy.

Marcia Howe checked with the Institute for Continuing Legal Education regarding the possibility of having it produce the Appellate Practice Section's newsletter. Mary Hiniker indicated that ICLE currently does two section newsletters. She estimated that the cost for the APS newsletter would be approximately \$2,000 per

issue and she recommended publishing three issues a year. The price would include obtaining material from contributors and editing and formatting the copy, but the Section would be responsible for production and distribution expenses.

Deb Hebert will also contact Madelyne Lawry, who edits the Negligence Section's newsletter, and ask for a quote.

Deb said that she would be willing to take over editing the newsletter herself after the end of her term as Chair, i.e., in 2006-2007, if someone can be found to handle it until then. Janet Boes and Marcia Howe volunteered to work on it as well. Eileen Kavanagh will mail Deb the copy she has. Deb will see what can be used or updated for a short issue in early 2006. She urged members to start thinking about articles for subsequent issues, which can be discussed at the December 2005 Council meeting.

2. Michigan Bar Journal Appellate Practice theme issue. Mark Cooney sent an e-mail to Linda Novak, the managing editor of the Michigan Bar Journal, suggesting another Appellate Practice theme issue. Mary Massaron Ross recommended timing it to precede the 2007 Michigan Appellate Bench Bar Conference, perhaps in February or March of 2007. Linda Garbarino will call Linda Novak.

D. Federal Practice. John Bursch has become co-chair of the committee, with Paul Bernard. They are working on a seminar for 2006, tentatively titled "Federal Court Deference to State Courts." It may be coordinated with the Sixth Circuit Judicial Conference (May 17-20, 2006), in Detroit.

E. Technology.

1. Court of Appeals e-filing pilot project. Sandra Mengel reported that the Court of Appeals' pilot project on e-filing of MPSC appeals, which began in June, has been going well. The court would like to expand on it, but there are "money and logistics" issues. Barbara Goldman suggested that the State Appellate Defender Office might be a good place for the next phase, if there is one. There were some concerns, however, about accommodating prosecutors from across the state and pro per filings by prisoners.
2. State Bar of Michigan E-filing Task Force. Barbara Goldman participated in a demonstration of "Lexis File and Serve," which the company is eager to sell for state-wide application in Michigan.

After the demonstration, Janet Welch, General Counsel of the State Bar, asked how much interest there is among practitioners in e-filing. So far, the response to the Ottawa County pilot project has not been enthusiastic, but it was agreed that interest will increase as mandatory e-filing in federal courts is implemented. The main concern is that there are several different versions of "e-filing," which can become a burden on practitioners. There are also issues relating to time required to scan and redact exhibits that are not in digital format.

There was some discussion of "e-service," which is distinct from "e-filing." It was agreed that, if the appellate community thinks it is important, we should make that known. Jill Wheaton suggested that even electronic notification of electronic filing would be useful.

F. Economics of Appellate Practice. Mike Updike will pursue his interest in a requirement that all trial testimony, including that presented by deposition, be transcribed, noting that there is an “economic component” to the issue because court reporters are paid to be present during trials, rather doing transcriptions for their own benefit.

G. Good Deeds. No report.

H. Legislative Action. No report.

I. Circuit Court Appellate Rules. Don Fulkerson reported that a final draft of the proposed revisions to chapter 7.100 of the Michigan Court Rules was circulated to the Council by e-mail. He indicated that the rules represent “hard-fought compromises” between practitioners and judges but acknowledged that the committee anticipates there will be comments.

Deb Hebert asked if the Section should take any position on the rules at this point. Don said that the proposal will be sent to the Supreme Court, which will presumably publish the proposed rules for comment. The Section can act then if it decides to.

Don publicly thanked all the members of the committee: Amy Bird (SCAO); Ann Byrne, Secretary; Judge Stephen Cooper; Elizabeth Jacobs; Richard Lamb; Anica Leticia (special thanks for the chocolate chip cookies); Lynn Peterson (Court of Appeals); and Judge Brian Zahra. Deb Hebert also thanked the members of the committee on behalf of the Appellate Practice Section.

J. 2006 Annual Meeting. No report.

V. Old Business.

A. Transcript Certification Task Force. Deb Hebert talked to Patrick Rose. The task force consists of Patrick, Terry Flanagan, Peter Van Hoek and Tim McMorrow. They are interested in a possible amendment of the court rules on transcript certification, but not a major overhaul.

B. Invitation to Denise Devine (Information Technology, Court of Appeals). No report.

C. Conflict between MCR 2.602(A) and MCR 7.204(A) (date of order). Deb Hebert will draft a letter to the Supreme Court, proposing an appropriate amendment to MCR 2.602.

D. Transcription of depositions read at trial. See item IV(F), *supra*.

E. [Item VI(C).] Council vacancy. As discussed at the October 21, 2005 meeting, Tim Noonan has resigned from the Appellate Practice Section Council. It was **moved** (Linda Garbarino) and **seconded** (Vic Valenti) that Christina Ginter be appointed to the Section Council of the Appellate Practice Section. *Motion carried (unanimous)*.

F. [Item VI(H).] Program with the Michigan Supreme Court Historical Society. There was general agreement that the Appellate Practice Section should do something, at some point, with the Michigan Supreme Court Historical Society. Mary Massaron Ross suggested developing a “Supreme Court Advocates Group,” analogous to the [United States] Supreme Court Historical Society, directed to preserving the history of attorneys appearing before the Michigan Supreme Court. She agreed to call the President of the Michigan Supreme Court Historical Society (Wallace D. Riley) and report back. It may

be possible to arrange an event in conjunction with the 2007 Michigan Appellate Bench Bar Conference.

- G. [Item VI(A)] Appellate Practice Section comment on proposed amendments to AO 2004-5. Deb Hebert sent a letter to Judge Whitbeck, reflecting the Council's comments on the proposed amendments to AO 2004-5. See agenda packet

VI. New Business.

- A. Appellate Practice Section comment on proposed amendments to AO 2004-5. See item V(G), *supra*.
- B. Judge Whitbeck's comments to Supreme Court on proposed amendments to AO 2004-5. See agenda packet.
- C. Resignation of Tim Noonan. See Item V(F).
- D. Report of the September 16, 2005 meeting of the 2007 Michigan Appellate Bench Bar Conference planning committee. Mary Massaron Ross reported that the theme of the conference will be "what people in the system want from each other," examined from the perspective of the bench, the bar and possibly the clerk's office and central research division. There is particular interest in facilitating decision of cases on the merits and avoiding procedural problems that prevent it. The next meeting of the planning committee will be November 30, 2005.
- E. Appearance forms in the Michigan Court of Appeals. See Item IV(B)(3), *supra*.
- F. Board of Commissioners liaison. Deb Hebert announced that Scott Strattard has been appointed as liaison between the State Bar of Michigan Board of Commissioners and the Appellate Practice Section.
- G. Court of Appeals Internal Operating Procedures changes. In response to a query on the general membership listserv about whether revisions to the Court of Appeals' Internal Operating Procedures are announced, Sandy Mengel indicated that changes are made "periodically" and that the on-line version is always current. The most recent updates were effective September 1, 2005. She will ask the responsible staff person either to notify the Appellate Practice Section general membership listserv when modifications are made or to include an announcement with the next electronic opinion release.
- H. Supreme Court Historical Society Dinner. See Item V(F), *supra*.
- I. DNA bill. No appellate implications have been identified.
- J. [New item.] A posting on the general membership listserv on November 17, 2005, regarding a recent decision by the Court of Appeals in which the court declined to consider an issue because it was not listed in the party's "Statement of Questions Presented," generated considerable response. There was discussion of whether the Council should take any action. Several members felt strongly that the court should not rely on procedural defects as a method of avoiding decisions on the merits. Other members noted that there is no way to tell from most opinions what the quality of the underlying briefs was like. Sandy Mengel stated that none of the research staff at the Court of Appeals has the authority to omit substantive consideration of an argument based only on a procedural defect.

There were also concerns that the application of such rules has been inconsistent. The Council was interested in collecting data on how often such procedural “dodges” are employed, but it seemed that gathering that kind of information would be difficult. Mark Cooney, however, volunteered to review a group of cases, at least with regard to the “questions presented” problem, for possible discussion in the next Appellate Practice theme issue of the Michigan Bar Journal. Vic Valenti suggested contacting Evelyn Tombers regarding assistance from a law student.

VII. Next Meeting.

Teleconference on Friday, December 16, 2005, 2:00 p.m. Dial 1-800-270-1153; passcode 124048#.

VIII. Adjournment.

The meeting was adjourned by acclamation at 4:45 p.m.

Respectfully submitted,

Barbara H. Goldman
Secretary