

**APPELLATE PRACTICE SECTION**

November 17, 2006

*Farmington Hills, Michigan*

*Present:*

Linda Garbarino  
Paul Bernard  
Barbara Goldman  
John Bursch

*Excused Absences:*

Terry Flanagan  
Liisa Speaker  
Deb Hebert

*Guests:*

Janet Boes [phone]  
Megan Cavanagh  
Judith Curtis [phone]  
Mark Cooney  
Phillip DeRosier  
Tim Diemer  
Christina Ginter  
Marcia Howe  
Ron Lederman  
Anica Letica  
Gerald Posner  
Stephen Rhodes  
Roz Rochkind  
Mary Massaron Ross [phone]  
Mike Updike  
Jill Wheaton  
Vic Valenti

Sandra Mengel  
Dennis Pollard

I. Welcome and call to order.

The meeting was called to order at 2:15 p.m. Linda Garbarino welcomed Dennis Pollard as a guest.

The secretary circulated a roster of members of the Section Council and requested updated address information.

II. Approval of minutes of meeting of October 20, 2006 [previously circulated].

One correction was noted. It was **moved** (Mike Updike) and **seconded** (Gerald Posner) that the minutes of the meeting of October 20, 2006 be approved as corrected. *Motion carried* (unanimous).

After discussion, it was agreed that the Chair would resume sending copies of the agenda of upcoming meetings of the Section Council to the Chief Judge of the Court of Appeals and the Chief Justice of the Supreme Court but would not include draft minutes of prior meetings.

The secretary will forward final copies of the minutes of all meetings of the Section Council to the State Bar of Michigan.

III. Treasurer's Report.

Linda Garbarino reported that she had arranged for the division of the costs of the Annual Meeting program with the Litigation Section.

IV. Committee Reports.

A. Court Liaison/Rule Comment. No report.

B. Michigan Court Practice.

1. October 6, 2006 letter to Judge Whitbeck. See agenda packet.
2. October 6, 2006 Case Management Work Group memorandum. See agenda packet.
3. Second amended Administrative Order 2004-5. The Supreme Court approved the Case Management Work Group's proposed amendment to Administrative Order 2004-5 before the Appellate Practice Section could make a comment on it.

There was some concern that the process did not provide enough time for comments. Mary Massaron Ross indicated that the work group "encouraged" feedback from practitioners, including the Appellate Practice Section. The Case Management Work Group's next report is scheduled to be submitted on November 1, 2007. The Appellate Practice Section should be prepared to react quickly. It was agreed without motion that the item should be taken up at the Section Council's meeting in May, 2007.

Mary noted that the expedited docket for summary disposition appeals will be a topic of the 2007 Michigan Appellate Bench Bar Conference, but the focus of discussion will be directed to broad policy issues rather than implementation of the Administrative Order.

C. Publications.

1. Newsletter. Christina Ginter and Deb Hebert are working on the next issue of the Appellate Practice Section newsletter, which should be ready soon.
2. Michigan Bar Journal appellate practice theme issue. No report.

D. Federal Practice.

See Item IV(J), *infra*.

E. Technology.

Sandra Mengel reported on the Court of Appeals' recent implementation of electronic filing of appeals from decisions of the Michigan Public Service Commission, working with Wiznet, their new vendor. The court hopes to offer e-filing for another class of cases next year.

Electronic service of pleadings will be the next phase of the project. The court is adding more large monitors to its computer system and hopes to reach the point where paper "courtesy copies" of pleadings will be unnecessary.

F. Economics of Appellate Practice. No report.

G. Good Deeds. No report.

H. Legislative Action. No report.

I. Circuit Court Appellate Rules.

Anica Letica indicated that the committee is still working on a rule for appeals from zoning board decisions.

J. 2007 Annual Meeting.

1. Meeting. Linda Garbarino reported that the 2007 meeting of the State Bar of Michigan will be held at the Amway Grand Hotel in Grand Rapids.
2. Program. Paul Bernard is developing a program on issues related to “judicial independence.” He will try to enlist at least one federal and one state court appellate judge for a panel discussion. Retired United States Supreme Court Justice Sandra Day O’Connor has recently spoken about “threats to the independence of the judiciary.” Mary Massaron Ross has a copy of the address, which she will provide to Paul. She also recommended inviting Chief Justice Danny J. Boggs of the Sixth Circuit to participate. Other suggestions included having an “academic” on the panel.

K. Ad Hoc Committee/Project Reports.

1. Michigan Supreme Court Historical Society dinner. Mary Massaron Ross reported that the board of the Michigan Supreme Court Historical Society has created an “advocates guild” of attorneys who have argued in calendar cases before the court. It is collecting “advocates’ history” of the court and may do some historical research later.

L. 2007 Michigan Appellate Bench Bar Conference.

1. Lifetime Achievement Award. The Appellate Practice Section has traditionally presented a “Lifetime Achievement Award” to a retired or retiring appellate judge or justice at the Michigan Appellate Bench Bar Conferences. After discussion, it was generally agreed that we should continue selecting recipients who are no longer active or are nearing the end of their careers, although federal judges who have taken “senior status” may be included in this category. Mary Massaron Ross thought a written description of the award criteria had been developed for the 1995 Appellate Bench Bar Conference. Brian Shannon may know where it is.

Several possible recipients were suggested. It was agreed without motion that the Chair would send a request for nominees to the members of the Section Council, rather than posting a message to the Council listserv, and request private replies. A decision should be made no later than the December teleconference meeting.

2. [New item.] Coordinators for the family law breakout sessions are needed. Barbara Goldman will post a message to the general membership listserv on November 20, 2006 and direct responses to Mary Massaron Ross.

V. Old Business.

- A. Administrative Order 2006-05 (amendment of MCR 6.610, 6.625 and 7.103). See agenda packet.

- B. State Bar of Michigan Board of Commissioners' position on proposed fee increases for the Court of Appeals. At its July 29, 2006 meeting, the State Bar of Michigan Board of Commissioners adopted the Appellate Practice Section's recommendations regarding various proposed fee increases for the Court of Appeals. See agenda packet.

VI. New Business.

- A. ADM File No. 2003-59 (proposed amendment of MCR 2.112 [special matters] and 7.206 [original proceedings in the Court of Appeals]).

Dennis Pollard described the effect of the "Headlee Amendment" (Const. 1963, art 9, §25), which allows original actions to be brought in the Court of Appeals. Although "Headlee cases" may be initiated in circuit court, the provision for attorney fees applies only to matters begun in the Court of Appeals. There are no corresponding court rules, which has caused confusion and delay. He urged the Appellate Practice Section to become involved in improving the situation.

Sandra Mengel indicated that the Court of Appeals' Rules Committee recommended the changes proposed in ADM 2003-59, but that the court would be receptive to other suggestions in response to it. The court is willing to collaborate with practitioners in the development of specific rules.

Some Council members were concerned that the Appellate Practice Section does not have enough experience with Headlee cases to provide meaningful input. After discussion, it was agreed that Linda Garbarino and Dennis Pollard would prepare a letter to the Supreme Court, recommending the creation of a task force on Headlee Amendment cases in the Court of Appeals. If the court does not react by March of 2007, the Appellate Practice Section can reconsider the matter and possibly create its own committee. Because the comment period for the administrative file has already expired, Linda will send a short letter to the Supreme Court, indicating that the Section Council plans to make a more detailed comment at a later date.

- B. ADM File No. 2005-36 (proposed amendment of MCR 7.204 and 7.205 [tolling the time for filing an appeal or application for leave to appeal]); comment deadline March 1, 2007.

Referred to Court Liaison/Rule Comment for a report at the January 2007 meeting.

VII. Next Meeting

**Thursday, December 14, 2006, 2:00 p.m., teleconference** (800-270-1153, pass code 124048#).

VIII. Adjournment.

It was **moved** (Gerald Posner) and **seconded** (Paul Bernard) that the meeting be adjourned at 3:45 p.m. *Motion carried* (unanimous).

Respectfully submitted,

Barbara H. Goldman

Secretary