

APPELLATE PRACTICE SECTION

December 16, 2005

Teleconference

Present:

Deb Hebert
Barbara Goldman
Paul Bernard

Janet Boes
John Bursch
Megan Cavanagh
Judith Curtis
Tim Diemer
Terry Flanagan
Don Fulkerson
Christina Ginter
Ron Lederman
Anica Leticia
Gerald Posner
Mary Massaron Ross
Liisa Speaker
Mike Updike
Vic Valenti
Jill Wheaton

Excused Absences:

Mark Cooney
Linda Garbarino
Roz Rochkind

Guests:

Sandra Mengel

- I. Welcome and introductions. The meeting was called to order at 2:07 p.m. Deb Hebert introduced Christina Ginter.
- II. Approval of minutes of meeting of November 17, 2005 (previously circulated). One correction was noted. It was **moved** (Gerald Posner) and **seconded** (Liisa Speaker) that the minutes be approved as corrected. *Motion carried (unanimous).*
- III. Treasurer's Report (previously circulated). Paul Bernard noted that there had been only a "small amount" of activity since the October report. The current balance is over \$28,000.
- IV. Committee Reports.
 - A. Court Liaison/Rule Comment.
 1. Court of Appeals Internal Operating Procedures updates. After discussion, it was agreed that this question had been adequately addressed during the program portion of the 2005 Annual Meeting and the item should be dropped from the Council's agenda.
 2. Appearance forms for the Michigan Court of Appeals. No report.

3. 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.

B. Michigan Court Practice Committee.

1. Court of Appeals expedited summary disposition (“fast track”) docket. Megan Cavanagh is continuing to collect data for a report, tentatively planned for January 2006, on the first year of this program.
2. Effect of dismissals without prejudice on finality of other orders. The committee will look into this issue after the “fast track” docket report is complete.

C. Publications

1. Newsletter – next issue. Deb Hebert reported that there has been “some progress” in preparing the next issue of the newsletter, which will be short. She will work with Susan Oudsma, at the State Bar of Michigan, on it. Production and mailing will take approximately two weeks after they receive the copy.

Deb got the material previously submitted from Eileen Kavanagh on December 3, 2005 and has updated it. Several other items are already completed, including an article by John Bursch on letters of credit; two book reviews by Mary Massaron Ross; a draft of a new letter from the Chair; a short report on the economics of law practice survey; and an article by Liisa Speaker.

Deb plans to include a report on the “fast track” docket in the spring issue.

2. Newsletter – “contracting out.” Deb Hebert called Madelyne Lawry but has not received a response yet.

D. Federal Practice.

1. Spring program. Paul Bernard and John Bursch agreed that the program’s topic should be “federal deference to state court decisions,” including areas such as the effect of the 1996 habeas reform amendments and developments in the doctrine of federal abstention. Mary Massaron Ross greeted the idea with enthusiasm and volunteered to work on the program. She indicated that the topic would be of interest to “a number of” local federal judges, either as panelists or participants.
2. Sixth Circuit Judicial Conference. The Sixth Circuit Judicial Conference will be held in Detroit on May 17-20, 2006. It was agreed that the Appellate Practice Section’s federal practice program should be independent, but possibly it could be scheduled for a different time at the same location. Paul or John will discuss it with Kathleen McCree Lewis.

E. Technology.

Barbara Goldman attended a demonstration of another electronic filing-and-service program at the Court of Appeals on November 30, 2005, by Wiznet, a company from Florida, which has set up e-filing in several other states. Sandra Mengel reported that members of the information systems staff of the Court of Appeals and the Supreme Court have a meeting planned, to discuss e-filing.

F. Economics of Appellate Practice.

Mike Updike will continue to explore issues related to transcription of depositions read at trial.

G. Good Deeds. No report.

H. Legislative Action. No report.

I. Circuit Court Appellate Rules.

Don Fulkerson reported that the Civil Procedure Committee of the State Bar of Michigan has reviewed the draft rules prepared by the committee and wants a rule on zoning board appeals to be included. Don indicated that the issue had been debated extensively within the committee. He is “working with” the State Bar committee, but the Circuit Court Rules Committee will address the problem if necessary. The committee hopes to send its report to the Supreme Court in January of 2006.

J. 2006 Annual Meeting. No report.

K. Ad hoc committees and project reports.

1. Transcription of depositions read at trial. See Item IV(F), *supra*.

2. Michigan Supreme Court Historical Society program.

a. Chief Justice Taylor has indicated he would like to have an event in Lansing, not connected with the Michigan Appellate Bench Bar Conference.

b. Mary Massaron Ross has arranged a meeting with Angela Bergman (Executive Director) and Wallace Riley (President) of the Michigan Supreme Court Historical Society, to discuss a joint event with the Appellate Practice Section.

3. Review of cases where issue was deemed waived because it was omitted from the “Statement of Questions Presented.” Gerald Posner raised a related topic, whether alternative arguments must be included in the statement of questions. Any data on application of these “old formalisms” in current Court of Appeals cases should be sent to Mark Cooney.

4. [New item.] Task force on revision of Chapter 7.200 of the Michigan Court Rules. Sandy Mengel said that she remains interested in a “general effort to isolate rules” that could be modified. The idea would be to shift the emphasis away from strict requirements and look for changes that could be made to facilitate the appellate process. She will approach Judge Whitbeck, to see if the Court would approve of the basic concept of a group, such as a committee or task force, with a long-range assignment of examining the rules and recommending changes. Barbara Goldman volunteered to be part of the group, if it is formed.

V. Old Business.

A. Invitation to Denise Devine. Deb Hebert talked to Denise Devine, the director of information systems at the Court of Appeals, about coming to a meeting of the Section Council. She is very interested and would be available in either Farmington Hills or Lansing. After discussion, it was agreed that Deb should invite Denise Devine to the

March 24, 2006 APS Council meeting. She will also try to invite Denise's counterpart at the Supreme Court.

B. Conflict between MCR 2.602(A) and MCR 7.204(A). See Item IV(A)(3), *supra*.

C. 2007 Michigan Appellate Bench Bar Conference.

1. Mary Massaron Ross reported that the planning committee held a meeting on December 7, 2005. It was decided not to have the "dine-arounds" with judges on Wednesday evening, before the conference. Instead, the judges who attend will have designated tables at dinner on Thursday evening and there will be assigned seating for the other conference participants.
2. Mary invited anyone who is interested to join the planning committee. The next meeting will be at 3:00 p.m. on Monday, January 23, 2006 at the Court of Appeals Detroit office. The Court of Appeals has offered the use of the teleconference facilities at its Troy, Lansing and Grand Rapids offices for anyone who cannot make it to Detroit.

VI. New Business.

A. Request by Judge Avern Cohn. In early December, Judge Avern Cohn of the United States District Court for the Eastern District of Michigan contacted Linda Garbarino, saying he had been studying peremptory orders, issued without briefing and argument, by the Michigan Supreme Court. He indicated that he was speaking on the topic in January of 2006. He had already compiled statistics and was interested in attending a Council meeting to talk about the subject.

Megan Cavanagh thought that the "speech" Judge Cohn referred to might be a debate between him and Dan Saylor, of Garan Lucow in January. [NOTE: the debate is scheduled for January 24, 2006 at 4:00 p.m.]

There was considerable discussion. Some members were interested in Judge Cohn's data, but others thought the Appellate Practice Section should do its own study. It was agreed without motion that the matter should be tabled until the February 2006 Council meeting.

B. MTLA seminar on appellate practice. Don Fulkerson is organizing an all-day seminar on April 20, 2005 for the Michigan Trial Lawyers Association, on appellate issues. Liisa Speaker indicated that she and Steven Hicks were also involved in planning it. Gerald Posner and Barbara Goldman volunteered to work on the project and/or participate as speakers.

VII. Next meeting.

Friday, January 20, 2006, 2:00 p.m., Lansing. Deb Hebert will check with Evelyn Tombers regarding using the conference room at Cooley Law School.

Don Fulkerson will bring cannolis.

VIII. Adjournment

It was **moved** (Gerald Posner) and **seconded** (Mike Updike) that the meeting be adjourned at 3:05 p.m. *Motion carried (unanimous).*

Respectfully submitted,

Barbara H. Goldman
Secretary