

**APPELLATE PRACTICE SECTION
2007-2008 SECTION ANNUAL REPORT
STATE BAR OF MICHIGAN**

Section Name: Appellate Practice Section

Mission Statement: The Appellate Practice Section of the State Bar of Michigan provides education, information and analysis about issues of concern through meetings, seminars, website, public service programs, and publication of a newsletter.

Officers and Membership:

Chair: Paul R. Bernard

Chair Elect: Barbara H. Goldman

Secretary: Liisa R. Speaker

Treasurer: Megan Cavanagh

Council Members:

Frank J. Bernacki

Cara Edwards

Peter J. Van Hoek

Marcia L. Howe

Anica Letica

Gerald F. Posner

Timothy Diemer

Rosalind H. Rochkind

Liisa Speaker

Michael L. Updike

Jill Wheaton

Judith A. Curtis

Christina Ginter

Ronald S. Lederman

Mary Massaron Ross

Phillip J. DeRosier

Stephen J. Rhodes

Linda M. Garbarino

Deborah Hebert

J. Mark Cooney

2006-07 Council Meeting Schedule (date and location):

Friday, October 19, 2007 - Farmington Hills

Friday, November 16, 2007 - Farmington Hills

Thursday, December 13, 2007 - Phone conference

Friday, January 18, 2008 - Lansing

Friday, February 15, 2008 - Farmington Hills

Friday, March 21, 2008 - Farmington Hills

Friday, April 18, 2008 - Farmington Hills

Friday, May 16, 2008 - Farmington Hills

Wednesday, June 18, 2007 - Dinner meeting in Brighton

Events/Seminars:

1. September 2007, Program of the Appellate Practice Section, Annual Meeting of the State Bar of Michigan, *Political Challenges to Judicial Independence*

Annual Report/Article VIII, § 1:

The Appellate Practice Section, in its eleventh year as a Section of the Michigan State Bar, has continued efforts to promote the skillful, efficient, and effective practice of appellate law among Michigan practitioners. The Section currently has 681 members.

Throughout this past year, the Section Council has:

1. Worked with appellate courts to review and recommend policies and procedures to advance the administration, funding and operation of the courts;
2. Conducted programs to improve the skills of appellate attorneys; and
3. Published a quarterly newsletter.

Advancing administration in the appellate courts:

One of the central missions of the Section Council is to monitor, comment on and propose changes to court rules affecting appellate practice. The Council commented on proposed changes to MCR 2.119, 7.204 and 7.205, which affected the rules governing appeals in cases where there was a motion for reconsideration of the order to be appealed. The Council's comment suggested a change in the language of the proposed amendment to eliminate any confusion about the kind of decisions subject to the rule. The comment also included a brief discussion of the value of preserving some trial court discretion over the timing of post-judgment motions. The Council also commented on proposed changes to several rules governing the appeal of decisions about governmental immunity: MCR 2.614, 7.101, 7.202, 7.209, and 7.302. In general, the proposed amendments sought to facilitate interlocutory appeals from such decisions and to assure that trial court proceedings would be stayed during the pendency of such appeals. The Council pointed out some ambiguities and inconsistencies in the proposed amendments that could lead to uncertainties about the correct appellate procedure in such cases.

The section filed amicus briefs in two cases dealing with questions of appellate procedure. In *Houdini Properties, Inc v City of Romulus*, Supreme Court Case No. 132018, the question arose whether a claim of appeal to a circuit court from a decision of a municipal zoning board is subject to the rules of mandatory joinder in connection with any suit in the circuit court alleging that the decision violated a party's constitutional rights. The Section took the position that there should be no mandatory joinder because a "claim of appeal" is not a "pleading" as that term is defined in the mandatory joinder rule. The case also involved the question whether a circuit court's ruling in an appeal from a zoning board decision would be res judicata with respect to

any subsequent suits arising from that decision. The Section contended that, because an appeal from a zoning board decision and a suit claiming a violation of rights from such a decision involved different aspects of the circuit court's jurisdiction, there should be no res judicata effect. The Supreme Court's decision was consistent with the Section's arguments. In *Beavers v Barton Malow Co*, 480 Mich 1049 (2008), the section took a position on the question whether the time for filing a delayed application for leave to appeal was tolled during the pendency of an appeal in the same case, contending that case law identified a longstanding judicial policy of permitting equitable tolling and that this policy should be preserved. In the event that the Supreme Court chose not to adopt this interpretation of the rules, the Section proposed an amendment to the rules that would permit such tolling. The Supreme Court's ruling was consistent with the Section's argument about the effect of existing case law on the interpretation of the rule. In addition, the Supreme Court undertook consideration of an amendment of the relevant rules.

Through the work of its committee on the Economics of Appellate Practice, the Council began a project of drafting proposed amendments to the Michigan Court Rules of 1985 dealing with the responsibility of a court reporter to produce a true *verbatim* transcript of the on-the-record proceedings. Too often, court reporters do not transcribe depositions read into the record or testimony given by videotape. There are also instances in some criminal matters where audio tapes, such as the tapes kept by police dispatchers and 911 operators, are played at trial. The proposed change in the court rule purports to prevent such things from happening, and thus making it easier for appellate attorneys, their clients and Michigan's appellate courts. The project had not been completed at the time of this report, but the Council plans to complete the proposed amendments and submit them to the Supreme Court during the next Council year.

Improving Advocacy Skills:

In September, 2007, at the annual meeting in Grand Rapids, the Section presented a program regarding the nature of political challenges to judicial independence. A variety of challenges were discussed, but particular attention was paid to legislative efforts to circumscribe judicial jurisdiction or to subject judicial decision to "review" by voter initiatives. The panelists included Hon. David Sawyer, Court of Appeals, Hon. James Ryan, United States Court of Appeals for Sixth Circuit, and Prof. Steven Croley, University of Michigan Law School.

Through the commitment and efforts of the Newsletter Committee, the Section published two newsletters, in Winter of 2008 and Spring of 2008. Additional newsletters are planned in the Summer and Fall of 2008.

The members of the Section's publications committee also contributed to the preparation and editing of a "theme" issue of the Michigan Bar Journal, which was published in April 2008. Articles were solicited from members of the Section and Council, and they included: "The Who, What, When, Where, and Why of Appellate Specialists," by Jill M. Wheaton and Lauren M. London; "Navigating the Michigan Court of Appeals Website," by Sandra Schultz Mengel; "Supreme Review: Insights on the Michigan Supreme Court's Consideration of Applications for Leave to Appeal," by Shari M. Oberg and Daniel C. Brubaker; "A Practitioner's Guide to

Effective Oral Advocacy Before the Michigan Supreme Court,” by Mary Massaron Ross; and “Transparency and Authority in Appellate Decision-Making,” by Paul R. Bernard.

The Section also maintains a listserv, which Section members may use to share knowledge and exchange ideas about effective appellate practice. In this respect, it is often a useful instrument for the education of the Section membership about effective advocacy. During the year, the Council and its Technology Committee began the process of defining a policy for the use of the listserv and updated the list of Section members to who participated in the listserv. These measures were undertaken to preserve the efficient use of the listserv and the promotion of its educational purpose.

The Section Council:

The Section’s Council consists of 17 Council members and the three immediate past chairs, who serve as ex-officio members. The Section is headed by four officers - the Chair, Chair-Elect, Treasurer, and Secretary. The Council meets monthly, except for July and August.

Standing and Ad-hoc Committees:

Much of the work of the Section is done through its committees - four standing and several ad hoc, depending on the needs of the particular year. The Standing Committees consist of: Court Liaison/Rules Comment Committee - V. Valenti and R. Lederman, Co-Chairs; Federal Court Practice Committee – M. Massaron Ross and J. Bursch, Co-Chairs; Technology Committee, B. Goldman, Chair; Michigan Court Practice Committee - M. Cavanagh, Chair; Publications Committee - M. Howe, Chair. Within the Publications Committee is the Newsletter Committee - D. Hebert, M. Howe and C. Ginter, Co-Chairs. The Newsletter Committee oversaw the editing and publication of Winter 2008 and Spring 2008 issues, with Summer 2008 and Fall 2008 issues forthcoming. Finally, through the work of our Good Deeds committee, R. Lederman, Chair, the Section made contributions to a moot court competition and the Thomas M. Cooley Law School, the Michigan Supreme Court Historical Society and the Michigan Center for Civic Education

The involvement of Section members is solicited through the Listserv, the newsletter and the seminars. Anyone wishing to become involved may contact any one of the members listed on the Sections’ website.

Resources Provided by the State Bar of Michigan

Among the State Bar resources utilized by the Section, are the following: conference call services, listserv services, publication and mailing services, and financial reporting services.

Future Goals and Activities:

Program planned for annual meeting in Dearborn on September 18, 2008: *Balancing Civility and Zealous Advocacy in Appellate Practice* (tentative title)

Seminar on federal appellate practice, scheduled for Spring, 2009.

Chair Contact Information:

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