

APPELLATE PRACTICE SECTION

April 21, 2006

Grand Rapids, Michigan

Present:

Deb Hebert
Linda Garbarino
Barbara Goldman
Paul Bernard [phone]

Excused Absences:

Janet Boes
Mark Cooney
Mary Massaron Ross

Guests:

John Bursch
Megan Cavanagh [phone]
Tim Diemer [phone]
Marcia Howe [phone]
Ron Lederman [phone]
Anica Letica [phone]
Gerald Posner [phone]
Roz Rochkind [phone]
Liisa Speaker
Mike Updike
Vic Valenti
Jill Wheaton [phone]

Tim McMorrow

I. Welcome. The Chair called the meeting to order at 2:10 p.m. Deb Hebert thanked John Bursch for making the meeting arrangements.

II. Approval of minutes of meeting of March 24, 2006 (previously circulated).

It was **moved** (Vic Valenti) and **seconded** (Mike Updike) that the minutes of the meeting of March 24, 2006 be approved. *Motion carried* (unanimous).

III. Treasurer's Report.

Paul Bernard indicated that there had been no extraordinary expenses since the last report.

IV. Committee Reports.

A. Court Liaison/Rule Comment.

Vic Valenti, Barbara Goldman and Liisa Speaker made presentations at the Michigan Trial Lawyers Association seminar, "Preserving and Protecting Your Appeal in the Trial Court," on April 20, 2006, which also featured a discussion by a panel of judges.

Judges Brian Zahra and Stephen Borrello of the Michigan Court of Appeals and Judges Robert Colombo and Cynthia Diane Stephens of the Wayne Circuit Court commented on the number of appeals that had been taken from denials of motions for summary disposition based on governmental immunity, as a result of the 2002 amendment of MCR 7.202(6)(a)(v). The Section opposed the amendment at the time it was proposed. The possibility of "revisiting" the rule in light of the adoption of the expedited summary disposition docket was discussed.

Vic Valenti said the Court Liaison/Rule Comment committee would be willing to look into it over the summer. There is a possibility that the trial court judges might be supportive of a change, because the governmental immunity appeals complicate management of their dockets. It was agreed without motion that Megan Cavanagh, Vic Valenti and Sandra Mengel (if available) would set up a “study group” to examine the effect of the revision before the 2007 Michigan Appellate Bench Bar Conference.

B. Michigan Court Practice.

1. Report on Court of Appeals expedited summary disposition docket.

It was agreed that the Council needs to decide how to approach the next assessment of the expedited summary disposition docket. There will be less than a year’s worth of practitioner feedback on the revisions of the administrative order by the time we would need to make a second report.

Some members thought the “fast track” procedure had led to an increase in the time to decide case on the nonexpedited docket. After discussion, it was agreed that the Council would likely support a recommendation that AO 2004-5 be extended for one year, so that an additional full year of data could be collected. A scientific survey, similar to the unpublished opinions project of 1999, is a possibility. Input can also be gathered during the 2007 Michigan Appellate Bench Bar Conference.

Deb Hebert agreed to approach Sandra Mengel to see if the court has data on time to decision for nonexpedited cases and if it could be made available to the Council. We can then discuss the subject at the June meeting.

At the MTLA seminar, Judges Zahra and Borrello also indicated that the Court of Appeals was “surprised” by how few motions to remove case from the “fast track” had been filed. An anonymous survey of the Court of Appeals judges, then, might also be of interest.

2. Effect of orders of dismissal without prejudice.

No report.

C. Publications.

1. Newsletter.

The cost of the most recent newsletter was approximately \$1000, including mailing.

Deb Hebert set a deadline of May 1, 2006 for copy for the next issue, which she hopes to have mailed in May. Mark Cooney, Liisa Speaker, John Bursch, Linda Garbarino and Brian Shannon have committed to writing items for it; Mary Massaron Ross may also have some book reviews. All members of the Section are urged to contribute.

Deadline for the third issue of 2006 will be approximately August 1, 2006.

2. *Michigan Bar Journal* appellate practice theme issue. No report.

D. Federal Practice.

Paul Bernard said that he had just been notified that Tim Baughman would not be able to participate in the May 19, 2006 program on U.S. Supreme Court advocacy, due to his

need to appear before the U.S. Supreme Court for a supplemental oral argument in *Hudson v Michigan* on May 18, 2006. Paul anticipated that David Moran would also be unavailable, for the same reason. The possibility of rescheduling the program for a later date, perhaps at Wayne State University, was discussed. It was agreed without motion that Paul should talk to the panelists and make a decision about what to do.

- E. Technology. No report.
- F. Economics of Appellate Practice. No report.
- G. Good Deeds. No report.
- H. Legislative Action. No report.
- I. Circuit Court appellate rules. No report.
- J. 2006 Annual Meeting.

Linda Garbarino reported that the 2006 Annual Meeting of the Appellate Practice Section will be on Thursday, September 21, 2006, 3:00 p.m., at the Ann Arbor/Ypsilanti Marriott at Eagle Crest. The working title is "Trial and Appellate Lawyers: Partners not Adversaries."

The Litigation Section is interested in cosponsoring the program. The Chair-Elect of the section, Brad H. Sysol, is supposed to contact Linda to discuss who should moderate it. She would like to have a panel of two judges and two others. Vic Valenti recommended obtaining the materials from the April 20, 2006 MTLA seminar (see Item IV(A), *supra*) from Don Fulkerson.

- K. Ad Hoc Committees and Projects.
 - 1. Michigan Supreme Court Historical Society event. No report.
- L. 2007 Michigan Appellate Bench Bar Conference (May 2-4, 2007).

An on-line survey was sent to practitioners, judges and members of the staffs of both the Court of Appeals and the Supreme Court. Megan Cavanagh is collating the responses.

The committee is working on finding a speaker for the luncheon on Thursday.

V. Old Business.

- A. Conflict between MCR 2.602(A) and MCR 7.204(A). Deb Hebert will prepare a letter on this issue in conjunction with a newsletter article.
- B. Court of Appeals FY 2007 budget.
 - 1. On March 28, 2006, Janet Welch, General Counsel of the State Bar of Michigan, forwarded the State Bar of Michigan's "Public Policy Principles Concerning Judicial Branch Funding," adopted in 2003, to Deb Hebert. See agenda packet. Janet indicated, however, that when the Court of Appeals' funding proposal is brought before the State Bar of Michigan Representative Assembly, they will probably refer it to the Section. Deb Hebert will call Janet and ask for an update on the April 7, 2006 RA meeting.

2. After the March 24, 2005 Council meeting, Deb Hebert told Sandra Mengel that the Appellate Practice Section could not support the fee increases proposed by the Court of Appeals because it would conflict with a position of the State Bar of Michigan (see Item V(B)(1), *supra*).

VI. New Business

A. Section's Annual Report.

The Section's Annual Report is due on May 31, 2006. Deb Hebert will send a reminder by e-mail to all committee chairs, requesting their reports by May 21.

B. State Bar of Michigan Public Policy Summit.

The State Bar of Michigan is sponsoring a "Public Policy Summit" in Lansing on Wednesday, April 26, 2006. Linda Garbarino will attend on behalf of the Appellate Practice Section.

C. June 2006 meeting.

There was general agreement that we should proceed with a dinner meeting. Deb Hebert will investigate restaurants in the Novi/Brighton area. Due to the heavy westbound rush-hour traffic, we should consider scheduling the meeting for early in the evening.

D. 2006 Section Leaders Summit.

It was **moved** (John Bursch) and **seconded** (Vic Valenti) that the Council approve Linda Garbarino's attendance at the 2006 State Bar of Michigan Section Leaders Summit.

E. Section Briefs.

John Bursch asked for suggestions for upcoming "Section Briefs" in the *Michigan Bar Journal*, noting that the deadline is May 5, 2006 for the June 2006 issue. It was recommended that he submit something about the Annual Meeting program.

VII. Next meeting.

There was discussion of what to do about the May 21, 2006 Council meeting if the Federal Practice program is cancelled. It was decided without motion that the Council meeting should proceed at the offices of Dickinson Wright, preceded by a lunch reception at 1:15 for participants in the Sixth Circuit Judicial Conference. Paul Bernard will work with Kathleen McCree Lewis on publicity. Deb Hebert will invite Denise Devine to discuss court technology.

VIII. Adjournment.

It was **moved** (Mike Updike) and **seconded** (Vic Valenti) that the meeting be adjourned at 4:00 p.m. *Motion carried* (unanimous).

Respectfully submitted,

Barbara H. Goldman

Secretary