

**Appellate Practice Section Council
March 14, 2008
Farmington Hills, Michigan--Secret Wardle**

MEETING MINUTES

Present:

Frank Bernacki
Paul Bernard
Mark Cooney
Graham Crabtree (by phone)
Judith Curtis (by phone)
Phil DeRosier
Tim Diemer (by phone)
Cara Edwards (by phone)
Christina Ginter
Barbara Goldman
Deborah Hebert
Ron Lederman
Anica Letica (by phone)
Gerald Posner
Roz Rochkind
Michael Updike
Jill Wheaton

Excused Absences:

Megan Cavanagh
Linda Garbarino
Marcia Howe
Mary Massaron Ross
Stephen Rhodes
Liisa Speaker
Peter Van Hoek

Guests:

Vic Valenti
Stephanie Morita
Don Fulkerson

Welcome and Call to Order

- A. Paul Bernard called the meeting to order at 2:10 p.m.
- B. Introduction of guests.
- C. Congratulations to Liisa Speaker on her new baby.

I Approval of Minutes

- A. February 15, 2008. Paul Bernard stated that he did not have a copy of the minutes in time to include it in the agenda. Barbara Goldman moved for provisional approval of the minutes and Frank Bernacki seconded. Motion was tabled until the next meeting, after all members have had an opportunity to review the minutes.

II Treasurer's Report

- A. Megan Cavanagh could not be present for the meeting. Paul Bernard stated that the report indicates that there are no substantial changes and that the Section has over \$39,000 as of the end of February.

III Committee Reports

A. Court Liaison/Rules Comment

- 1. Vic Valenti emailed a copy of the Beavers proposed rule amendment to Ann Boomer at the Supreme Court, and she acknowledged receipt.
- 2. Stephanie Morita of Secret Wardle prepared a revised proposed amendment to MCR 8.108 per our discussion last month, to be discussed in new business.

3. Proposed amendments to governmental immunity rules: Vic attempted to find the prior APS position letter on earlier change to "final order" rule to include governmental immunity appeals, but could not find it. There is no specific recommendation from the Committee regarding these rulechanges. Rule changes will be discussed later in new business.
4. Proposed Wikipedia rule to be discussed later in new business.

Don Fulkerson made two comments:

1. An organization he sits on, the Michigan Court Reporters and Recorders Board of Review, prepared an amendment to MCR 8.108 to address the same problem we are attempting to address, transcription of depositions played or read at trial. Their proposed rule has been submitted to the Supreme Court. Don will email the proposed rule to Stephanie and/or Council to see if the Section may want to support it or use it in connection with their own proposal.
2. Report on the circuit court rules committee: The delay has been due to an attempt to draft a rule to address zoning appeals, and multiple subsequent changes in the statute governing zoning appeals. Don states that he hopes the rules will be finalized in a few weeks.

B. Michigan Court Practice

1. Megan Cavanagh is not present. No report.

C. Publications:

1. Newsletter: the most recent edition of the newsletter has been published and distributed. The next issue has a submission deadline of April 1. The editors expect to have sufficient material for that issue. For future issues, Deb Hebert will be sending an email to Council members regarding commitment to produce an article.
2. Michigan Bar Journal: Congratulations to Marcia Howe and to all of the authors for an excellent issue.

D. Technology

1. Listserv. Barbara Goldman states that the listserv will be reformed April 15. No password will be needed. She will send a reminder to people who do not have email addresses listed with the State Bar.
2. Don Fulkerson expressed concern regarding the reformatting of the State Bar website, making retrieval of opinions difficult, because it is now searchable only by opinion name.
3. Vic Valenti noted that he has had problems downloading briefs from the Supreme Court website.

E. Federal practice.

1. Mary Massaron Ross not present. No report.

F. Legislative Action.

1. Graham Crabtree reports that nothing significant is happening. The only legislation other than those already on agenda that could be relevant to lawyers is an act dealing with recognition of foreign country money judgments. The bills we discussed last time have not progressed. Other new legislation will be addressed in new business.

G. Good Deeds.

1. Don Fulkerson sought a donation for the Michigan Center for Civic Education, which runs several programs, including including a mock trial tournament for high school students and a "We The People" mock Congressional hearing on the Constitution for younger students.

Deborah Hebert moved to give \$2000, and Gerry Posner seconded. Mark Cooney offered an amendment of \$2500, to which Deborah Hebert agreed, and Christina Ginter seconded. Unanimous vote in favor of donating \$2500. Motion carried. Check is to be made out to Don Fulkerson. Don gave a heartfelt "thank you" to the Section.

2. Paul Bernard reminded the Council of the Michigan Supreme Court Historical Society request that the APS buy a corporate membership. Discussion ensued regarding the nature and work of the Society and the benefits of such a membership (including, possibly, seats at the annual luncheon). Deborah Hebert made a motion to purchase the corporate membership and Frank Bernacki seconded. Vote was 13 in favor, 2 opposed. Motion carried.

H. Economics of Appellate Practice.

Mike Updike states: no report other than Stephanie Morita's revision to MCR 8.108, to be discussed later.

I. 2008 Annual Meeting

1. Barbara Goldman stated that the meeting is scheduled for Thursday, September 18, 2008, from 2-4, at the Dearborn Hyatt.

Barbara proposed a topic dealing with civility in appellate practice, with a panel to include both bench and bar, perhaps 1 or 2 retired judges. Suggestion that civility topic could be combined with advocacy. Barbara proposed a title such as "How zealous is zealous? Zealous advocacy versus civility." Discussion can include giving stipulations or ordering transcripts, as well as oral argument. Barbara will work on these ideas and present them at the next meeting.

IV. Old Business

A. 6th Circuit Seminar

Given Mary's absence, seminar will be discussed at the next meeting.

B. Beavers rule proposal.

Already discussed.

V. New Business.

A. Proposed court rule regarding Wikipedia

Discussion of need for new court rule regarding citation of Wikipedia (proposed on listserv in response to Liisa Speaker's article in Section newsletter). Some suggest rule is not necessary because advocate can point out the unreliability of Wikipedia or other such sources, if necessary. Others note that the problem of "disappearing" entries or websites can be addressed by indicating the date the website was accessed, and through use of websites such as waybackmachine.com that collect old websites. General consensus that there was a lack on interest in proposing a rule on this subject.

B. Constitutional amendment for judicial disqualification.

Graham Crabtree states that an amendment needs a 2/3 majority in both houses and it remains to be seen whether it will progress. He will keep an eye on it.

C. 2008 Judicial appropriations.

Graham Crabtree reports that this bill has not even reached Committee yet. It represents an increase of 1% over last year's judicial appropriation, from about \$259 million to about \$261 million. Graham will keep an eye on this.

D. Proposed amendment of 7.202 re: government immunity appeals.

Vigorous discussion of this proposed amendment as well as amendment to MCR 7.209 regarding stays in governmental immunity appeals. Both rules appear to be a codification of current case law. Members pointed out ambiguity in language of proposed amendment of MCR 7.202 making it unclear whether all summary disposition motions in cases involving government immunity, or all motions raising the issue even if not ruled on by the trial court, would be immediately appealable. Others suggest that the amendment is unnecessary given existing case law.

Discussion then focused on the problems with the existing version of MCR 7.202(v) and whether Council should take a position addressing the amendment and requesting the Court to reconsider the "immediate appeal" rule for governmental immunity appeals, or simply address the existing proposal. Discussion of problems with the existing rule, including multiple repetitive appeals that delay litigation for years, confusion regarding stays, and the effect of "forcing" defendants to appeal when they do not necessarily want to. Discussion regarding the differences between the federal court system and §1983 appeals versus Michigan courts, which allow an interlocutory appeal.

Council previously took a position opposing adoption of the rule (adopted December 2002) and sent a letter. Question is whether Council should use this opportunity to update its position, in light of experience of several years, that the rule should be eliminated or at least that some alternatives could lessen its burden, such as limiting immediate appeals to only one.

Proposal: send a letter outlining all of the problems with the current rule, and recommend that the issue be revisited, perhaps by a court-appointed committee or work group, and then offer an alternative position either opposing or tweaking the language of the current proposed amendment. There was also discussion regarding convening a plaintiff/defendant group to address the problem, and to enlist support from various involved groups, such as Michigan Association for Justice or Michigan Municipal League.

Paul Bernard will check with the State Bar to see if we can be given more time to submit our position. Gerry, Roz, and any other members interested in this issue will send their ideas to Vic Valenti. Roz will talk to the MML about their position. We will discuss this again at the next meeting.

Mike Updike will look in the archives for the Council's letter regarding the adoption of MCR 7.202(v). If he cannot find it, Vic will contact Ann Boomer to see if she can find it.

VI Next Meeting

- A. Meeting traditionally held in Grand Rapids, but no current members are from Grand Rapids, so Paul Bernard proposed holding the meeting in Southfield. Since there is no disagreement, the meeting is scheduled for April 18, 2008, at 2 p.m., at Secret Wardle in Southfield.

VII. Adjournment

Gerry Posner moved to adjourn, and Deborah Hebert seconded. Unanimous vote in favor. Meeting adjourned at 4:00 p.m.

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