WSBA

COURT RULES AND PROCEDURES COMMITTEE

Meeting Minutes
October 15, 2012

Committee Chair Hillary Evans called the meeting to order at 9:30 a.m.

Members present: Chair Hillary Evans, Gene Barton, Roy Brewer, Dean Chuang (by phone), Paul Crisalli, Anne Cruser (by phone), Maureen Cyr, Tony DiTommaso, Jr., Eric Eisenberg, Sean Flynn, David Iseminger (by phone), Kailin James, Shannon Kilpatrick, Shawn Larsen-Bright, Roger Leishman, Kathleen Nelson, Bryan Page (by phone), Ann Summers, Karen Denise Wilson, Judge Kevin Korsmo (by phone), Judge Blaine Gibson, and Judge Rebecca Robertson.

Members excused from attending: Katharine Bond, Daniel Brown, Leslie Clark, Elizabeth Fraser, Dale Johnson, Nicole McGrath, Jeannie Mucklestone, and Shannon Ragonesi.

Members who did not respond to meeting notice: David Stevens.

Also attending: Ken Masters (BOG Liaison – by phone), Nan Sullins (AOC Liaison), Elizabeth Turner (WSBA Assistant General Counsel—Staff Liaison), and Sherry Mehr (WSBA Paralegal).

Non-Members/Guests present: Jason Amala (WSAJ Court Rules Committee--by phone), Nicole Hecklinger, and Mike Runyan

Welcome/Introductions:

The Chair welcomed the Committee and asked each member to introduce him or herself.

The Chair explained that this year's cycle includes the Rules for Appeal of Decisions of Courts of Limited Jurisdiction (RALJ) (subcommittee chaired by Ms. Fraser); and the Rules of Appellate Procedure (RAP) (subcommittee chaired by Ms. Summers). We will also have Subcommittee X, chaired by Mr. Barton, with one of the main issues being CR 6 days/day calendar counting; and Electronically Stored Information (ESI), subcommittee chaired by Mr. Larsen-Bright. The Chair explained that the majority of the

work is done in the Subcommittees and attendance at those meetings is crucial. The Committee follows Robert's Rules of Order during main committee meetings. The Chair explained the rulemaking process to the Committee, and stated that getting the input of other members and stakeholders is very important to vetting and scrubbing a rule. The Chair then discussed the Committee's timeline and deadlines in order for the Board of Governors to get materials to the Supreme Court by their annual deadline. She said the Committee needs to be active in seeking input and responses from the Stakeholders. This process will polish the language of the rules, making sure the language is good and the intention is clear.

Ms. Turner stated the Committee abides by the rule "if it's not broken, we do not fix it", and if a Subcommittee considers an issue but either the Subcommittee or the main Committee determines that there is no problem to be fixed, we don't try to fix it.

Ms. Turner explained the new reimbursement policy – if you travel more than 50 miles one-way to attend a meeting, you will be reimbursed, and if you don't travel 50 miles, the WSBA will only pay travel expenses if the meeting is scheduled for more than 3 hours. Ms. Turner also said that if it's easier to attend the meetings via phone to please do so and if not, please attend in person. Ms. Turner expressed that this is a very active and important Committee – to the Board of Governors (BOG) and the membership as whole.

Mr. Masters (BOG Liaison and former Committee chair) expressed that this Committee is very valuable to the Bar Association and the State of Washington. He explained that BOG protected this Committee and acknowledges how important the Committee is, and that it is understood that this Committee requires a great deal of in-person work, and encouraged people to attend the meetings in person if it is at all possible to do so.

The Chair explained the list of the meeting dates and noted that the November 12, 2012, meeting is set on a holiday and is a phone conference. The meeting could be canceled but we are holding it on the schedule for now.

Minutes: The June 2012 minutes were approved by consensus with no changes or corrections.

Old Business: Ms. Turner reviewed the proposals which the Committee had submitted to the WSBA Board of Governors last year and the status of those proposals, and stated that everything the Committee proposed was approved for submission to the Court. Ms. Turner stated that assuming everything is published for comment, the Committee should not have to deal with too many comments due to this Committee being very good at vetting and scrubbing a rule before it is brought forward.

Ms. Turner then explained how the rules cycle works. The rules cycle is established by the State Supreme Court pursuant to GR 9. Once the Committee approves a proposed rule or amendment, it will submit their recommendation to the WSBA Board of Governors; the Board of Governors in turn either approves the rule for submission to the

Supreme Court, denies it, or sends it back to the Committee for more work. Every rule has to be approved by the Committee; even if an individual proposes a rule, only the Committee can approve the rule. And everything the Committee does must be approved by the BOG; the Committee cannot and does not send things directly to the Court. The process of proposing and submitting rules to the Supreme Court is a very long process.

The Committee receives many proposed rules from a lot of sources. In addition, if a proposed rule change is submitted directly to the Court and it is not from this Committee, the Court will oftentimes send the proposed rule to the Committee for review and comment. If the proposal is not in the rules cycle schedule, it generally goes to Subcommittee X.

The Board of Governors takes the rules process very seriously and needs time to discuss proposed rules. This is known as First Read, and generally takes place one BOG meeting before the actual vote on the Committee's proposals. Ms. Turner explained that the Committee's proposals are due to the BOG in June and July; this does not allow the Committee a lot of time to review the proposed rules. Committee meetings are scheduled before the Board of Governors meetings and that the Subcommittees need to be meeting in between those meetings to complete their work. Ms. Turner said April, May, June and July are especially critical meetings because most of the Committee's work is voted on during those meetings.

The Chair said a lot of the editing is done in the Subcommittees. The Committee, as a whole, will make any corrections, if needed, but tries to avoid drafting in Committee.

Mr. Masters expressed that the Board of Governors believes that this Committee for the past 10 years is perhaps the hardest working committee at the Bar Association, and this is an incredibly strong committee. Last year, the BOG unanimously passed CR 34, which was a remarkable achievement given the approximately 7 years' work involved in getting this rule proposal approved. Mr. Masters said the BOG has very good and open-minded members and is looking forward to hear from this Committee.

Ms. Turner reported that last session the Supreme Court ordered the Revised Family Law Civil Rules proposed by the Local Rules Task Force to be published for comments and the deadline for comments is April 30, 2013. After the deadline, we anticipate that the Supreme Court will then ask the WSBA to respond to comments, which may involve this Committee. The proposed FLCR started off with 5 pages and now are approximately 85 pages.

New Business: Mr. Runyan inquired about the lack of a CR subcommittee; Ms. Turner explained that Subcommittee X will take over both the items carried over from last year's agenda and any new proposals if any CR changes are brought forth. Subcommittee X is responsible for any rule that is not covered by any other Committees.

Mr. Masters suggested the Committee not hesitate to utilize Ms. Turner due to her phenomenal wealth of knowledge, and stated the Committee is in good hands with Ms. Evans at the helm. The Chair closed by requesting that the subcommittees meet after the full committee meeting adjourned.

Meeting Adjourned at 10:30.

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9 November 2012

M E M O R A N D U M

TO: Hilary Evans, Rules Committee Chair

FROM: Ann Summers, RAP Subcommittee Chair

SUBJECT: Summary of November 8, 2012 meeting

This was the subcommittee's first meeting, so members were introduced, and members who were not on last year's Ad Hoc subcommittee (addressing the proposed changes to the PRP rules) were updated on the progress made last year with rules 16.3 through 16.8.

Rule 16.8(c) was revisited. The purpose of the proposed amendment is to prevent timely petitions from being rejected for filing, possibly rendering them untimely, based on technical deficiencies, such as failing to correctly fill out the statement of finances. However, the amendment is not intended to automatically add 60 days to the statutory time bar for all deficient petitions, such as a petition that states no more that "I received ineffective assistance of counsel." The consensus of the subcommittee was that a clearly frivolous petition should be filed and dismissed as frivolous, and that the rule as amended allows for that. In order to be clear that the rule encompasses all technical deficiencies the subcommittee agreed that the words "is in a form that" should be taken out of the new proposed language.

The subcommittee next discussed the "admit or deny" provisions of WACDL's proposed rule 16.9. A number of the subcommittee members expressed concern that this would be an onerous requirement for respondents given the nature of these petitions, which are often poorly written and organized. However, the subcommittee agreed that there should be a way for a petitioner to request that a respondent admit or deny a specific allegation, such as the existence of exculpatory evidence to support a Brady claim, under the appropriate circumstances and at the appellate court's direction.

This led to a discussion of how rule 16.9 does not reflect current practice, in that respondents do not customarily respond within 60 days of service, but generally wait for an order from the appellate court to file a response. Seth Fine had previously drafted a new rule 16.8A, that sets forth more accurately the current practice. This proposed rule would also address WACDL's concern that when a CrR 7.8 motion is improperly transferred to the appellate court over petitioner's objection, the petitioner should not be required to file an appellate filing fee. The proposed rule also allows for a procedure for the appellate court to efficiently remand CrR 7.8 motions that have been inappropriately transferred back to the superior court. The proposed amendments to rule 16.9 require a response only when ordered by the court, which is the current practice.

A new section to rule 16.9 was proposed to address the petitioner's ability to request that respondent admit or deny specific allegations. After discussion, there was a consensus that such requests would be less likely to be overlooked, and less likely to become pro forma, if they occurred

by separate motion. In order to ensure that a motion may be handled directly by the Chief Judge or Acting Chief Judge handling the PRP, a new sentence is proposed for rule 16.15(a) allowing all motions made in PRPs to be decided by the clerk, commissioner, Chief Judge, Acting Chief Judge or panel of judges. In order to make the rules consistent, a new clause is proposed for rule 17.2, governing who decides motions generally, adding "except as provided in rule 16.15(a)."

The following proposed amendments are now on the table and will be further considered and discussed by the subcommittee at the next meeting on Thursday, December 13:

RAP 16.8 PERSONAL RESTRAINT PETITION – FILING AND SERVICE

(a) Filing Fee. A personal restraint petition will be filed by the clerk of the appellate court only if the statutory filing fee is paid, unless the appellate court determines that the petitioner is unable to pay the filing fee. The statute requiring payment of a fee for filing a petition for writ of habeas corpus is controlling.

(b) Filing in Court of Appeals. A personal restraint petition filed in the Court of Appeals must be filed in the division which includes the superior court entering the decision on the basis of which petitioner is held in custody or, if petitioner is not being held in custody on the basis of a decision, in the division in which the petitioner is located.

(c) Deficient Petitions. If the clerk of the appellate court determines that a petition submitted ~~is in a form that~~ does not conform with this rule or with rule 16.7, the petition should be filed and the clerk will direct the petitioner to correct the deficiency within 60 days.

(d) Service of Petition. If petitioner's restraint is imposed by the state or local government, the clerk of the appellate court will reproduce a copy of the petition and serve the petition on the officer or agency under a duty to respond to the petition. If petitioner's restraint is imposed by a person or agency other than the state or local government, the petitioner must prepare and serve a copy of the petition on the proper respondent.

(e) Amendment of Petition. The appellate court may allow a petition to be amended. All amendments raising new grounds are subject to the time limitation provided in RCW 10.73.090 and 10.73.100.

RAP 16.8A PERSONAL RESTRAINT PETITION – PRELIMINARY REVIEW BY COURT

(a) Preliminary Review. Upon receipt of the petition, the appellate court will conduct a preliminary review.

(b) Dismissal Without Response. The appellate court will dismiss the petition without requiring a response if it is clearly frivolous or clearly barred by RCW 10.73.090 or RAP 16.4(d).

(c) Remand to Superior Court. If the petition was originally filed as a habeas corpus petition or a motion under CrR 7.8, and the superior court clearly erred in transferring the matter to the Court of Appeals, the Court of Appeals will remand the matter to the superior court. If a case is remanded pursuant to this subsection, no filing fee will be required in the Court of Appeals.

(d) Order for Response. If the appellate court does not dismiss or remand the petition, the court will enter an order requiring a response.

RAP 16.9 PERSONAL RESTRAINT PETITION – RESPONSE TO PETITION

(a) Generally. The respondent must serve and file a response within 60 days after ~~the petition is served~~ entry of an order directing a response, unless the time is extended by the commissioner or clerk for good cause shown~~, or unless the court can determine without requiring a response that the petition should be dismissed under RCW 10.73.090 or RCW 10.73.140~~. The response must answer the allegations in the petition. The response must state the authority for the restraint of petitioner by respondent and, if the authority is in writing, include a conformed copy of the writing. If an allegation in the petition can be answered by reference to a record of another proceeding, the response should so indicate and include a copy of those parts of the record that are relevant. Respondent should also identify in the response all material disputed questions of fact.

(b) Motions to Admit or Deny. Upon motion of the petitioner or at the direction of the appellate court, the respondent may be directed to admit or deny specific allegations.

RULE 16.15 PERSONAL RESTRAINT PETITION--SUPPLEMENTAL PROVISIONS

(a) Motion. The procedure for and form of a motion is as provided in Title 17. Motions will ordinarily be considered without oral argument. Motions may be decided by the clerk, commissioner, Chief Judge, Acting Chief Judge or panel of judges.
(b) Release by Appellate Court of Person in Custody. The appellate court may release a petitioner on bail or personal recognizance before deciding the petition, if release prevents further unlawful confinement and it is unjust to delay the petitioner's release until the petition is determined. The appellate court or the superior court in its decision on the merits, or by separate order after a decision on the merits, may release a petitioner on bail or on personal recognizance. The appellate court may direct the release of petitioner with the conditions of release to be determined by a trial court.
(c) Oral Argument. Except as otherwise provided in rule 16.11(c), the procedure for oral argument is governed by Title 11.
(d) Disposition of Petition. The petition will be determined by the appellate court by written opinion or order briefly stating the reasons for the determination.
(e) Certificate of Finality. A certificate of finality is the written notification of the clerk of the appellate court to the trial court and the parties that the proceedings in the appellate court have come to an end.
(1) *When Certificate of Finality is Issued by the Court of Appeals.* The clerk of the Court of Appeals issues the certificate of finality:
(a) Thirty days after the decision is filed, unless (i) a motion for reconsideration of the decision has been earlier filed, or (ii) a motion for discretionary review to the Supreme Court has been earlier filed.
(b) If a motion for reconsideration is timely filed and denied, 30 days after filing the order denying the motion for reconsideration, unless a motion for discretionary review by the Supreme Court has been earlier filed.
(c) If a motion for discretionary review has been timely filed and denied by the Supreme Court, upon denial of the motion for discretionary review.

(2) *When Certificate of Finality is Issued by the Supreme Court.* The clerk of the Supreme Court issues the certificate of finality twenty days after the written opinion or order disposing of the petition is filed unless a motion for reconsideration of the decision is filed. If a motion for reconsideration is timely filed, the certificate of finality shall issue upon the entry of an order denying the motion for reconsideration.

(f) Costs. Costs are awarded as provided in Title 14.

(g) Indigency--Superior Court Determination. The provisions of CrR 3.1 apply to a personal restraint petition transferred to a superior court. If any of the petitioner's expenses incurred in the superior court are to be paid with public funds, the expenses shall be paid with funds appropriated by the county in which the superior court is located.

(h) Indigency--Appellate Court Proceeding. If the restraint is imposed by the state or local government, and if the appellate court determines that petitioner is indigent, the court may provide for the appointment of counsel at public expense for services in the appellate court, order waiver of charges for reproducing briefs and motions, provide for the preparation of the record of prior proceedings and provide for the payment of such other expenses as may be necessary to consider the petition in the appellate court. Invoices for expenses of an indigent person in the appellate court must be submitted to the appellate court which decided the petition in the form and manner provided in rule 15.4, except that a trial court order of indigency is not required and the invoice must be submitted within 45 days after the appellate court decision terminating the proceeding is filed. If a petitioner who claims to be indigent is in the custody of an agency of the Department of Social and Health Services, the clerk of the appellate court will obtain a statement of petitioner's known assets from the superintendent of the institution where petitioner is confined. Statutes providing for payment of expenses with public funds are not superseded.

RULE 17.2 WHO DECIDES A MOTION

(a) Generally. The judges determine (1) a motion in a brief, (2) a motion to modify a ruling by a commissioner or the clerk, (3) a motion for reconsideration of a decision, (4) a motion to recall the mandate, except for a motion made to correct an inadvertently issued mandate, and (5) a motion to publish. All other motions may be determined initially by a commissioner or the clerk of the appellate court except as provided in rule 16.15(a).

(b) Reference to the Judges. A commissioner or clerk may refer a motion to the judges for determination. If the motion is referred to the judges, the commissioner or clerk will give notice of the reference to all persons entitled to notice of the motion.

(c) Transfer by Supreme Court to Court of Appeals. A commissioner or clerk of the Supreme Court may transfer a motion for discretionary review of a trial court decision to the Court of Appeals for determination.

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3 January 2013

M E M O R A N D U M

TO: Hilary Evans, Rules Committee Chair

FROM: Ann Summers, RAP Subcommittee Chair

SUBJECT: Summary of December 13, 2012 meeting

The subcommittee meeting began by revisiting the proposed amendments to RAP 16.8, 16.8A, 16.9, 16.15 and 17.2 that were discussed and agreed on at the last meeting as outlined in the summary of that meeting. There were no additional changes proposed to those rules.

The subcommittee then discussed WACDL's proposed change to RAP 16.11 in regard to providing a definition of "frivolous." While there was some discussion of altering the standard itself, Seth Fine pointed out that the frivolous standard is used as a trigger in RCW 10.73.150(4) for appointment of counsel. In the light of this, the consensus was that the frivolous standard must remain in the rule. There was no consensus as to how the frivolous standard could be further defined. There was no consensus that the frivolous standard should be defined in a way such that more PRPs must be submitted to a panel of judges rather than dismissed by the Chief Judge. However, to make it clear that the frivolous standard in RAP 16.11 requires a different inquiry than the one made during preliminary review of the petition under new RAP 16.8A(b) ("the appellate court will dismiss the petition without requiring a response if it is clearly frivolous. . . "), there appeared to be consensus that RAP 16.11 should be amended as follows:

RULE 16.11 PERSONAL RESTRAINT PETITION—CONSIDERATION OF PEITION.

(a) Generally. The Chief Judge will consider the petition promptly after the time has expired to file petitioner's reply brief. The Chief Judge determines at the initial consideration if the petition will be retained by the appellate court for determination on the merits or transferred to a superior court for determination on the merits or for a reference hearing. For the purpose of rules in this Title 16, "Chief Judge" includes "Acting Chief Judge."

(b) Determination by Appellate Court. The Chief Judge determines at the initial consideration of the petition the steps necessary to properly decide on the merits the issues raised by the petition. If, after consideration of the response and any reply, the Chief Judge determines that the issues presented are frivolous, the Chief Judge will dismiss the petition. If the petition is not frivolous and can be determined solely on the record, the Chief Judge will refer the petition to a panel of judges for determination on the merits. If the petition cannot be determined solely on the record, the Chief Judge will transfer the petition to a superior court for a determination on

the merits or for a reference hearing. The Chief Judge may enter other orders necessary to obtain a prompt determination of the petition on the merits.

(c) Oral Argument. Decisions of the Chief Judge will be made without oral argument. If a petition is to be decided on the merits by a panel of judges, the appellate court clerk will set the petition for consideration by the panel of judges, with or without oral argument. If oral argument is directed, the clerk will notify the parties of the date set for oral argument.

The subcommittee also discussed the WACDL proposal regarding withdrawal of petitions contained in proposed RAP 16.11(d). The subcommittee members were aware of no problems with the appellate court not allowing petitioners to withdraw petitions. David Zuckerman expressed concern that pro se litigants whose CrR 7.8 motions are transferred to the appellate court for consideration as a PRP should be aware that they can withdraw the petition in order to avoid subsequent application of the successive petition bars. It was suggested that if this was the purpose of proposed RPA 16.11(d), it might be better placed in RAP 16.8 as a new subsection (f) regarding filing and service. David Zuckerman will work on that proposal for the next meeting.

Finally, Seth Fine expressed concern that there was not, in fact, consensus as previously reported in my August 3, 2012 memo on the proposed amendment to RAP 16.7(a)(3) regarding motions for discovery. Further discussion of this will occur at the next meeting.

The next meeting is scheduled for January 10, at 2 p.m.