WSBA

COURT RULES & PROCEDURES COMMITTEE

Meeting Agenda

March 15, 2010
9:30 a.m. to 1:00 p.m.
Washington State Bar Association
1325 Fourth Avenue – Sixth Floor
Seattle, Washington 98101

1. **Call to Order/Preliminary Matters**
   - Approval of Minutes (*see* Minutes of January 11, 2010 meeting, *pp. 99 - 103*)
   - Chair's Report

2. **Old Business**

3. **New Business/Subcommittee Assignments**
   - Electronic Discovery Subcommittee
   - Criminal Rules
   - Subcommittee X (*see pp. 104 - 106*)

4. **Other Business/Good of the Order**

5. **Adjourn**

WSBA

COURT RULES AND PROCEDURES COMMITTEE

Meeting Minutes
January 11, 2010

Committee Chair Ken Masters called the meeting to order at 9:30 am.

Members present: John Brangwin, Roy Brewer, Emily Brubaker, Steven R. Buzzard, William Croft (by phone), Thomas Cunnane, Anthony Di Tommaso JR, Rebecca Engrav, Hillary Evans (by phone), John Juhl, Barbara McInvaille (by phone), Bryan L. Page, Judge Rebecca Robertson, Karl F. Sloan (by phone), David Trieweiler, Neil Wachter, Judge Kevin Korsmo, and Judge Blaine Gibson. Also attending were Lincoln Beauregard (WSAJ), Jay Garrison (ATJ – by phone), Nikole Hecklinger (SCRAP), Roger Leishman (BOG Liaison), Jane Morrow (WSTLA – by phone), Brian Rowe (ATJ), Nan Sullins (AOC Liaison), Elizabeth Turner (WSBA Assistant General Counsel) and Anna Schmidt (WSBA Paralegal).

Chair Ken Masters welcomed members and introduced the BOG Liaison, Roger Leishman, and the Washington State Association for Justice (WSAJ) representative, Lincoln Beauregard. Mr. Masters congratulated member Rebecca Robertson on her new position as a judge.

Minutes
The minutes from the October 19, 2009 meeting were approved by consensus.

Chair's Report
Mr. Masters gave his Chair's report [see pp. 73 – 75 of the meeting materials]. The Supreme Court has acted on some of the Committee's recent proposals. Mr. Nunn is unable to attend today's meeting. The Chair reported on the ESI discussion at the last BOG meeting in December. They received a pretty rough reception regarding the proposed ESI rules. There is a general consensus that the rules, as they currently stand, will not pass the BOG. The ESI Subcommittee is currently working with the ATJ Technology Subcommittee to address concerns the ATJ subcommittee has regarding the proposed rules. The ATJ Technology Subcommittee hasn't brought their proposals before the ATJ Board yet, but we will continue to work with them. Mr. Nunn was optimistic about the possibility of changing the rule proposals in a way that may be acceptable to the BOG.

Mr. Leishman opined that he agreed with Mr. Master's analysis of the BOG's reception of the proposal and underscored that if the current ESI proposal was up for a vote before the BOG, it would probably fail. Mr. Leishman feels there is a lot of common ground between the Court Rules ESI Subcommittee and the ATJ Technology Subcommittee, and he believes that they can put together a proposal that will be better received by the BOG.

Mr. Masters also mentioned that a very important part of the Subcommittee's work is working with WSAJ, whose members on the BOG appear to be leading the charge against the proposal. He hopes that working with them and the ATJ people will result in creating a proposal that is acceptable by all. Steve Gonzales, chair of ATJ, was also at the BOG meeting and, similar to Mr. Nunn, had a more positive outlook regarding the BOG's reception of the ESI proposal than Mr. Masters. Ms. Turner stated that the BOG appreciates the large amount of work that the Court Rules Committee has done regarding this proposal; however, there is a very strong contingency that doesn't believe any changes should be made. The amended proposal may not come before the Committee as a whole until the March 2010 meeting.

Subcommittees

Criminal Rules Subcommittee: Chair Rebecca Robertson reported that the Criminal Rules Subcommittee is currently re-addressing three proposed rule changes: the arraignment rule (CrRLJ 4.1), the subpoena rule (CrR and CrRLJ 4.8), and the proposed recording rule (new rules CrR and CrRLJ 4.6 and 4.11). All have previously been sent through the Committee on prior occasions, but were rejected by the Supreme Court. The Subcommittee plans to send two versions of the arraignment rule to the BOG: one that requires defense counsel to be present at arraignment, and one that merely suggests that this be done, with a strong push from the rules committee to adopt the former. The sub-committee will work with the DMCJA to coordinate with their proposal. They will ask the BOG to send both versions to the Supreme Court, who will make a policy choice between the two. With the subpoena rule, there will also be two versions sent to the BOG as well. One would require notice to all parties when defense counsel seeks out records or testimony from witnesses, and one would not require notice. The recording rules will be rescrubbed and resubmitted with information from stakeholders. The Criminal Rules Subcommittee has a meeting next week where they will be discussing drafting several of those rules.

Mr. Masters explained that if Ms. Robertson needs to step aside in her role as Subcommittee Chair due to her new position as a judge, then Mr. Wachter will take her place as Chair of the Subcommittee. Until then, she will remain Chair of the Criminal Rules Subcommittee.

Judge Ann Harper has been coming to the Criminal Rules Subcommittee meetings and working with them so that their rule proposals will be close to those of the DMCJA.

Subcommittee X: Subcommittee Chair Rebecca Engrav reported that the original impetus for the MAR proposals is language from case law that requires a party to file and serve, and file their proof of service of, a request for a trial de novo within 20 days of an award being filed in order for their request for trial de novo to be considered. Some people think that requirement is pretty harsh. While looking at the MARs, the Subcommittee found other things that seemed inconsistent. They've resolved the original issue by stating that both the filing and service must occur within 20 days of an award being filed, but not filing the proof of service. This change occurs in MAR 7.1, by striking "along with proof that a copy has been served," and adding a new part (c) describing that you must file a proof of service and that failing to do so doesn't void your request.

There were concerns related to changes made to attorney's fees: counties were inconsistent in how they handled attorney's fees, with some local rules stating that arbitrators could award attorney's fees after the arbitration and some stating that they could not. Thus, the Subcommittee made changes to MAR 3.2 to give statewide authority to arbitrators to award attorney's fees. There were also concerns regarding the way this authority was implemented in MAR 6.4. The Subcommittee had created a 14-day timeline so that these cases would move forward; otherwise, within 14 days the request would be denied. Many groups and the BOG found this 14-day timeline too harsh. The Subcommittee expanded both MAR 6.4 and MAR 6.2 rules by proposing that the party may seek an order from the Court directing the arbitrator to rule by a certain date.

The Subcommittee also looked at local rules and then tweaked aspects of the language in MAR 6.4 in order to make it clearer (see double-underlining). Changes in 6.4(d), striking out certain text, are substantive.

Mr. Beauregard opined that, after analyzing the changes, they're consistent with the opinion formulated by the WSAJ and that he believes the changes will be met with approval. Their next meeting should occur before the proposed changes go before the BOG so that the WSAJ can draft another letter to the BOG. Ms. Turner stated the proposals would go before the BOG in June or July. Ms. Engrav requested that the WSAJ review them and allow enough time for her Subcommittee to meet again if further changes are requested.

During discussion of the proposals, Ms. Brubaker questioned the vagueness of MAR 6.4(d) and whether it would result in unnecessary motions filed with the court. Ms. Engrav stated it was purposely drafted to be vague, allowing a party to informally give notice to the arbitrator to make a decision regarding attorney's fees. Ms. Engrav stated that the Subcommittee felt it was best not to create a whole new set of procedures regarding informal notice; however, it might be better to see how this informal notice works in practice. Mr. Beauregard stated his own personal opinion: that he had been the strongest opponent of the previous proposal. Now, he feels the problems he saw with the previous proposal have been remedied by the changes made by the Subcommittee. Mr. Leishman asked if delaying the decision in appealing the merits is a

new practice. Ms. Engrav didn't believe that it was a change in practice – you usually appeal by a trial de novo. She stated that, in counties that have a local rule, if an award is pending, you cannot yet appeal for a trial de novo. Mr. Buzzard questioned whether an arbitrator, in awarding attorney fees and costs, might surpass his authority and whether such an award could cause a party to appeal an entire trial. Judge Gibson opined that the total authority of the arbitrator for awarding an amount is exclusive of attorney's fees and costs. Mr. Brewer agreed with Judge Gibson.

A motion came from the Subcommittee to approve the proposals to amend MAR 6.4 as shown on p. 82 of the materials. The motion passed, with eleven voting in favor, one opposed, and one abstention.

There were no proposed changes to MAR 6.2 in the last set of proposals that went before the BOG; however, the Subcommittee looked for parallel language to MAR 6.4. They took the sentence they crafted for MAR 6.4, regarding seeking an order from the Court directing the arbitrator to rule on attorney awards by a certain date, and added this language to MAR 6.2 for consistency. A motion to approve the language as shown on page 80 was approved by consensus.

Ms. Engrav asked everyone to look at the Supplemental materials, regarding MAR 7.1, that were distributed this morning. She stated that some aspects of this rule have been difficult to draft: one issue is the triggering date for the 20-day period. Case law states that time begins to run with the filing of the award and the filing of proof of service of the award; while local rules specify that it's when the award is filed. Thus, the rule now states that it's the longest of any of a list of five triggers. WSAJ had an objection to the list of triggers, feeling only the filing of the award or amended award should start the time. After further discussion, the Subcommittee concluded that all five of these items should act as a trigger. They struck language (lines 15-18) which they found cumbersome and difficult to read. On page 83, last year's language specified that it's acceptable to file early for trial de novo. This language raised issues of fairness. Thus, the Subcommittee came up with better language. In response to a question regarding why the WSAJ objected to the other three triggers, Ms. Engrav opined that they thought it was unnecessarily complicated. Mr. Beauregard agreed, but stated the biggest concern was the possibility of parties being discouraged from negotiating a resolution because a party had already filed for a trial de novo. He opined that the recent changes would meet with the WSAJ's approval.

Mr. Wachter proposed a friendly amendment to MAR 7.1 (lines 11 to 13): "Filing or service of a request for a trial de novo is not untimely..." He was concerned that parties may think they need to beat the 20-day period. Ms. Engrav explained her objection to the language and discussion ensued regarding whether the Subcommittee's language should be changed. Ms. Engrav ended by not accepting Mr. Wachter's friendly amendment. Mr. Brewer opined that the purpose of this language is not for those filing the request, but for the court to provide them with the ability to say "it was filed early, but it's timely."

Mr. Buzzard questioned whether #3 of the triggers in MAR 7.1 repeats what's written in MAR 6.4(d). Ms. Engrav stated that the Subcommittee left the language in both rules in order to be very clear. Ms. Brubaker had a concern regarding pro se confusion because language was struck regarding filing the trial de novo after the "latest" award. Would a pro se think he needs to refile the request for trial de novo again? Ms. Engrav explained the goal of their language is to clarify that a party would not need to re-file the request for trial de novo.

The Subcommittee's motion to approve suggested amendments to MAR 7.1 passed with 13 in favor, none opposed, and three abstained.

A motion to reaffirm MAR 6.3 and 3.2 as previously proposed was reapproved by consensus.

Ms. Turner reminded everyone that, in order to serve another term, members need to reapply. The application is in the current issue of the Bar News and available on-line. Anyone needing a link should contact her. In the future, Court Rules & Procedures Committees member's terms will default to 2 years, but that won't occur until the next cycle. The deadline for applications is March 1, 2010, which is a little earlier this year than last year.

The rules in the next cycle (2010 – 2011) are the evidence rules, the infraction rules for courts of limited jurisdiction, and anything else sent to us by the courts.

The meeting adjourned at 10:45am.

Perkins Coie

March 4, 2010

TO: WSBA Court Rules & Procedures Committee

FROM: Rebecca S. Engrav, Subcommittee X

RE: **ER 804 Proposal**

Summary:

Karl Tegland made a suggestion to amend ER 804 to adopt language on forfeiture by wrongdoing from the parallel federal evidentiary rule, in light of some recent case law. Subcommittee X recommends taking no action.

Proposal:

Federal Rule of Evidence 804 lists hearsay exceptions that apply when the declarant is "unavailable" as a witness. The federal rule provides that hearsay is admissible when the declarant is unavailable and the statement falls into this category:

> (6) Forfeiture by wrongdoing. A statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.

Fed. R. Evid. 804(b)(6). Washington's parallel ER 804 does not contain this language.

In a split decision in 2007, the Washington Supreme Court held that when the prosecution seeks to introduce the out-of-court testimonial statement of an unavailable witness, as a matter of equity the defendant in a criminal case may not object under the federal confrontation clause if the defendant procured the witness's unavailability through his or her own wrongdoing. *See State v. Mason*, 160 Wn.2d 910, 922, 925-27 (2007).

Karl Tegland suggested to Judge Gibson of our committee that it might make sense to adopt the language of the federal rule into Washington's rule, so that we would have the benefit of federal precedent interpreting the federal rule.

Discussion:

Subcommittee X considered this proposal at two meetings and also solicited and received informal opinions on it from King County prosecutors and defense attorneys. We identified several questions and issues:

(1) *Mason* is a federal constitutional law ruling. Thus, although it is based on the same principle as the forfeiture by wrongdoing evidentiary rule, it applies whether or not any change is made to ER 804.

(2) Karl Tegland's reasoning was that it would be useful to have available the precedent for the federal rule as interpretive guidance. But, given that *Mason* is a federal constitutional decision, federal cases shape and define the reach of the principle anyway. For example, since *Mason* was decided, a U.S. Supreme Court decision has addressed the issue and reached some conclusions slightly different from *Mason*. *See Giles v. California*, 128 S. Ct. 2678 (2008); *see also State v. Fallentine*, 2009 WL 151643, at *2 n.13 (Wash. Ct. App. Jan. 20, 2009) ("Thus, *Giles* overrules *Mason* to the extent *Mason* holds that a specific intent to prevent testimony is not required to apply the forfeiture doctrine.").

(3) As *Mason* and *Giles* demonstrate, the confrontation clause continues to undergo significant development in federal and state court decisions, and the dust has not yet fully settled.

(4) There appear to be some ways in which the federal evidentiary rule is interpreted that differs from what the Washington Supreme Court said in *Mason*. If ER 804 were amended to include the federal language, it might be unclear if *Mason* or the federal precedent governs, since the rule amendment would post-date *Mason*.

(5) A change to ER 804 would have broader reach than *Mason* alone. A confrontation clause objection can be made only as to testimonial statements. In *Mason*, the court did not decide whether the statements at issue were testimonial, because it held that even if they were, the defendant had forfeited the right to raise the confrontation clause objection. 160 Wn.2d at 922 ("However, because we adopt the doctrine of waiver by forfeiture below, we find it unnecessary to decide whether the statements . . . were testimonial."), 924, 927. It is not clear to me to what extent *Mason*'s adoption of forfeiture by wrongdoing would apply to non-testimonial statements. A change to ER 804 would apply to such statements, and thus might be broader than *Mason*. Further, it would extend the forfeiture-by-wrongdoing rule to civil cases as well as criminal (although admittedly the issue might not arise as often in civil cases).

(6) Our informal polling suggests that the prosecution and defense bar will not readily agree on the wisdom of a rule change.

(7) *Mason* has been on the books for three years and no constituency has come forward to advocate for a rule change.

(8) While we have not tracked it down, there must be some reason why Washington did not adopt the forfeiture-by-wrongdoing provision when it enacted ER 804. Because it is based on the federal constitution and "equity," *Mason* does not necessarily suggest that the Washington Supreme Court would approve of a change to Washington's evidence code.

In conclusion, we recommend that the Committee take no action on this proposal. *Mason* and related federal case law (e.g., *Giles*) are fully applicable and binding in the circumstances

considered therein. No rule change is necessary for those cases to have force and effect. Given the changing case law in this area, practitioners and judges are better served by looking to current case law rather than the static language of a rule. To the extent an amended ER 804 would apply in situations outside the reach of *Mason*, it seems inadvisable to amend a rule when no one has identified a problem with the current rule or has otherwise suggested a change would be advisable.