



# WSBA

## COURT RULES & PROCEDURES COMMITTEE

### Meeting Agenda

March 21, 2011

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 February 28, 2010 meeting Minutes, pp. 109 - 113)
  - Chair's Report
2. **Old Business**
3. **New Business/Subcommittee Assignments**
  - ESI Subcommittee (see Subcommittee Report, pp. 114 - 118)
  - Infraction Rules
  - ER Subcommittee
  - Subcommittee X, (see *Subcommittee Report*, pp. 119 – 123)
4. **Other Business/Good of the Order**
5. **Adjourn**

*Those one-year Committee members who wish to serve another term need to submit a new committee preference form. The committee/board/panel application for 2010-2011 is available online (on the myWSBA link at [www.wsba.org](http://www.wsba.org)) and in the January issue of the Bar News.*



# WSBA

## COURT RULES AND PROCEDURES COMMITTEE

### Meeting Minutes February 28, 2011

Committee Chair Ken Masters called the meeting to order at 9:38 am.

Members present: Lincoln Beauregard, David Bufalini (by phone), Judge Steven Buzzard, Paul Crisalli, Rebecca Engrav, Hillary Evans, Justo Gonzales (by phone), Paul Henderson (by phone), Bryan Page, Derek Smith, Ann Summers, Gregory Thatcher, Judge Kevin Korsmo (by phone), and Judge Blaine Gibson. Also attending were Marc Silverman (BOG Liaison), Sean Flynn (OPD), Mike Katell (by phone, ATJ), Nikole Hecklinger (SCRAP), Nan Sullins (AOC Liaison), Elizabeth Turner (WSBA Assistant General Counsel) and Anna Schmidt (WSBA Paralegal).

Chair Ken Masters stated that it's been a very light year, which is normal when reviewing the Evidence and Infraction Rules. Ms. Turner reminded those who were appointed to a one-year term that, if they would like to be a part of the committee in the next term, to reapply either on-line or by filling out the application in the January *Bar News*.

### Minutes

The October 18, 2010 draft meeting minutes will be voted on at the next meeting due to lack of a quorum.

### Subcommittees

***ESI Subcommittee:*** Subcommittee Chair Hillary Evans reminded the Committee that the ESI subcommittee began by looking at all the revisions made to the Federal Rules regarding electronic discovery. The subcommittee then decided to tackle the proposed changes rule by rule, and concluded that some of the state rules don't match up with the Federal Rules. They are currently working with ATJ because, if ATJ approves a specific change, then the BOG is more likely to also agree with the change. Ms. Evans stated that the subcommittee came up with an amendment for Rule 34 that the subcommittee really likes, but ATJ has not yet endorsed. Mr. Masters explained that, according to Don Horowitz, ATJ has some issues with the use of "format" and "form", and a few other issues. The Superior Court Judges and ATJ will vet the rules, and Judge Inveen will be the point person for SCJA.

Mr. Katell stated that ATJ reviewed the draft of Rule 34 and would like to work on a few issues; another phone conference with the subcommittee may resolve those issues. Mr. Masters reminded the Committee that the draft will subsequently come before them for review and a vote. Mr. Masters hopes that ATJ and the subcommittee will come up with a single proposal, but there may be two proposals in front of the larger Committee to vote on.

**Infractions:** Subcommittee Chair Steve Buzzard stated they've sent information out to a number of groups and users regarding proposed rule changes and have heard nothing back yet.

**Evidence Rules (ER) Subcommittee:** Subcommittee Chair David Trieweler was not present at the meeting. Mr. Crisalli reported, in his place, that the subcommittee is looking at an amendment to ER 501(h) proposed by Eric Stahl, by adding the cite to RCW 5.68.010 (journalist privilege statute protecting communications between news sources from compelled disclosure). Mr. Masters pointed out two cases that affect this rule and reminded the Committee to be careful when adding statute citations to rules.

**Subcommittee X:**

Amending the Expert Rules: Subcommittee Chair Rebecca Engrav reported that Subcommittee X received a proposal from a member to amend Washington's expert rules in order to conform them to the Federal rules. These changes in the federal rules were fairly significant (for example, testimony by experts is now protected), and the proposal was to make the same amendment to the state rules. The subcommittee felt that since the federal rule change had only recently gone into effect it would be better to wait a few months and see if there are some cases that result from it. Some of the subcommittee members simply didn't agree with the change as proposed [as there isn't a full Committee quorum, Subcommittee X's proposal not go forward with the proposed change at this time may need to be voted on at the next meeting].

"Days are Days" proposal: Ms. Engrav stated that Subcommittee X is working on another proposal that also comes from Federal Rules revisions: titled the "Days are Days" proposal. This proposal, which is an internal effort by the subcommittee, would change all the rules so that any period in a rule or statute would make a day a full day (without having to first determine whether to count weekends or not), make all time periods multiples of seven, and make the state rules consistent with the federal rules. Ms. Engrav stated that this may be a bigger chunk to bite off as the Committee would need to look at all state rules. There is also the policy question regarding whether changing stable existing rules does more harm than good. The subcommittee will work on this underlying policy question, but any proposed rule change will be handled by next year's Court Rules subcommittee.

Mr. Buzzard agreed that he likes the way the rules are currently. Ms. Hecklinger agreed, but also opined that simplifying how the days are counted is a very attractive proposal.

Expedited Review of RAP 18.13A: Ms. Engrav reported that a recent proposed amendment to RAP 18.13A was published for comment by the Court on an expedited basis. The proposal was submitted by OPD and ensures the appellate court's ability to decide termination appeals prior to the adoption of children who are the subject of the litigation. The proposal requires notice to be filed in appellate court when adoption proceedings are initiated while a termination order is under review, and then the appellate court could in turn stay the termination order pending the appeal. In two recent cases, the adoption was finalized while the termination is still on appeal, but the termination order was reversed on appeal, thereby creating a procedural nightmare which is not in the children's best interests.

Mr. Masters will create a subcommittee to work on this and make an expedited recommendation to the Court. This subcommittee will include Sean Flynn (OPD). Mr. Masters will speak to Judge Craighead regarding this tomorrow. Judge Craighead is interested in dealing with this issue and has some thoughts on it.

Mr. Flynn explained that the expedited review process was sought because of two cases decided last year in which termination orders on parental rights were decided after an adoption proceeding had already occurred. The problem is that a review of a termination decision can lead to reversal, which occurred in at least one of these two cases, thus throwing the case into chaos as the child had already been adopted out at that point. Mr. Flynn stated that, in both cases, the adoption orders and the reversals have not yet been addressed. Mr. Flynn stated that many of the attorneys that he works with who are dealing with the terminations don't always know an adoption is occurring. Adoptions are often being filed quickly and without consideration of the termination appeal. They are seeing a possible trend where there is a pending appeal of the termination and an adoption has already occurred. In addition, the Washington legislature has taken an interest in these cases and introduced a bill to address this matter. In response to why OPD thinks a Court Rule is better than a legislative fix, Mr. Flynn stated that they believe this problem to be a procedural matter. It seems incongruent for the legislature to carve out a rule addressing stay if there is already a Court Rule addressing the same issue. Mr. Flynn pointed out the need for an oversight process, where someone will stop the adoption process while the termination is being appealed. Even if the legislature creates a rule staying the adoption process, there still needs to be something done administratively to provide oversight. Mr. Silverman stated that the BOG would likely support the creation of a court rules to deal with this situation rather than a legislative fix.

Judge Korsmo questioned the rationale of choosing the appellate rather than the trial courts to stay the proceeding. Mr. Flynn stated that they felt the appellate court is in the best position to administer the stay. If the trial court were to administer the stay, there could be some question as to how the court working with the adoption would accept that stay. Mr. Flynn opined that termination appeals can take a long time, thereby affecting the adoption. Allowing some things to occur in the adoption, but holding off on finalizing it until the termination appeal is complete, might be better. Mr. Flynn wasn't sure of how good the trial court's position would be if they had to enforce a stay of adoption.

Ultimately, it might end up in the appellate court anyway, so that may be the best place to put that rule. Plus, it might help to ultimately expedite the adoption process.

Ms. Summers asked whether the termination appeal is considered to be on accelerated review. Mr. Masters stated it is. Mr. Smith opined that there are other ways to solve this issue rather than through this particular rule change; he doesn't believe having a permissive rule will solve the problem or assure that all or any of the adoptions will be stayed. He suggested a mandatory stay be imposed and notice given to everybody. Ms. Engrav agreed that any adoption should be stayed until all appeals are exhausted.

Judge Gibson explained that an automatic stay isn't always a good idea. In termination cases almost all of the natural parents have court-appointed attorneys and free appeals. Thus, there are a lot of appeals that are unsuccessful, so a stay would have been for naught. Judge Gibson felt that either the trial court or the appellate court should be able to look at an appeal and determine whether there is potential merit to it, even though there will be mistakes made along the way. Judge Gibson stated that there also may be venue issues, as people tend to move around, and the termination proceeding may start in one county and the child live in another county by the time trial occurs. Thus, having the rule at appellate level may be better. Judge Gibson also suggested the Committee address the issue of what to do when the problem [of a simultaneous termination appeal and adoption] actually occurs. In response to Mr. Beauregard's question of whether there is a resource where parents whose rights are being terminated can know where the adoption process is at, Mr. Flynn stated there aren't any because adoptions are closed proceedings. Mr. Crisalli envisioned a situation where privacy of the adopted parents is vital and giving notice to the parents whose rights are being terminated may affect this privacy.

In answer to the question of why an automatic stay should not occur, Mr. Flynn explained that (1) there are no such automatic stays in the appellate rules, (2) these aren't black and white issues – that is, there's no way for the attorney to review the merits of the case, and (3) once notice is provided, some natural parents do agree to the adoption occurring and some courts, knowing that an adoption has been started, will put a termination review at the top of their case load. Mr. Flynn stated that parents have a constitutional right to their review; but termination can be extremely hard on the children involved, so having it go forward quickly is important. Judge Buzzard explained that often the termination proceedings end in default because the natural parents do not show up for it. Judge Buzzard suggested guardianships should be reviewed at the same time. Mr. Flynn addressed the privacy issue. He stated there would need to be a limit to the scope of the notice because the parents [whose rights are being terminated] do not have standing to appear in those hearings. The important thing is that parents know what is occurring.

Mr. Masters directed everyone to the language of the proposed amendment at p. 106. Roger Wynne, the former Court Rules and Procedures Committee chair, has already commented on the proposal and posed several questions. In response to Mr. Wynne's question of whether there is a third party that may have been granted custody, Mr.

Flynn responded that the state would usually have responsibility. Mr. Flynn further responded that the state defends the termination on appeal, and that the appeal is not sealed or a closed proceeding. In response to Mr. Wynne's comment asking whether custodian the correct word to use in the second provision, Mr. Flynn explained that that term is from the statute. Mr. Wynne pointed out that referencing 8.6 seems to be the operative rule here – Mr. Flynn thought that that made sense.

Mr. Masters again stated that a subcommittee will be formed. Because this rule is already published for comment with a deadline of April 30, Mr. Masters reminded the Committee that anyone of them can individually send in a comment. In response to the question of who the counterpart to OPD would be, Mr. Flynn stated that the Attorney General's office (AGO) would be the counterpart as they both defend the appeal and consent to the adoptions. However, the AGO was contacted and did not see a need for amending the rule. The AGO suggested that any change should probably occur through the legislature.

Ms. Turner stated the next Board of Governors meeting, where the Committee's decision would come before the BOG, is April 29. Ms. Turner explained an Ad Hoc process in an emergent situation where, instead of bringing a proposed change before the BOG to vote on, the BOG president would sign off on the Committee's decision. Mr. Silverman didn't think the BOG would find this situation an emergent situation. He opined that this issue could both be heard and brought for action at the April BOG meeting. Mr. Silverman will communicate with BOG President Steve Toole, letting him know this issue will be brought before the Board of Governors.

The meeting adjourned at 10:54 am.

TO: WSBA Court Rules and Procedures Committee

FROM: Hillary Evans, Subcommittee on ESI

RE: ESI Report

DATE: March 14, 2011

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For the past several months, the ESI Subcommittee has been working with the ATJ to devise a version of CR 34 which both the ATJ and the WSBA Rules and Procedures Committee could endorse. Attached you will find the ESI Subcommittee's latest draft. The ATJ has two objections to this draft – "form versus format" and "including but not limited to." At this meeting, we ask the full committee's direction on these two points (and not the full rule).

#### **A. Form versus Format.**

Where CR 34 currently reads "form or forms" the ATJ would like to change it to "form or format."

ATJ's position: ATJ believes the terms "forms" and "formats" have different meanings. They believe the word "forms" means specifying paper copy, electronic file, audio file, etc. They believe the word "format" is more specific, meaning a word file versus an excel file versus .pdf file, for example.

Subcommittee's position: The subcommittee has researched this issue and concluded "form or forms" is preferable. First, both state and federal rules use the term "forms" not "formats."

Second, the term "format" is redundant. The Oxford English Dictionary confirms "format" is rooted in "form." The Dictionary of Computing confirms the same is true in the computing context. The Sedona Conference's Glossary on E-Discovery and Digital Information Management also supports the conclusion that "form" encompasses "format."

*Form of Production*: The manner in which requested documents are produced.  
**Used to refer both to file format (e.g., native vs. PDF or TIFF) and the media on which the documents are produced (paper vs. electronic).** (emphasis added).

*Format* (noun): The internal structure of a file, which defines the way it is stored and used. Specific applications may define unique formats for their data (e.g., "MS Word document file format"). Many files may only be viewed or printed using their originating application or an application designed to work with compatible formats. There are several common email formats, such as Outlook and Lotus Notes. Computer storage systems commonly identify files by a naming convention that denotes the format (and therefore the probable originating

application). For example, “DOC” for Microsoft Word document files; “XLS” for Microsoft Excel spreadsheet files; “TXT” for text files; “HTM” for Hypertext Markup Language (HTML) files such as web pages; “PPT” for Microsoft Powerpoint files; “TIF” for tiff images; “PDF” for Adobe images; etc. Users may choose alternate naming conventions, but this will likely affect how the files are treated by applications.

Third, other states have encountered this same issue and decided that “form or forms” was preferred. In 2008, the Judicial Council of California went through the process of reviewing and revising their version of CR 34 (CCP 2031.030) and they purposefully retained the "form or forms" language that our committee has proposed. The Judicial Council's drafters adopted the "form or forms" language in part because it more clearly expresses the concept that different forms of production may be suitable for different types of ESI.

The subcommittee therefore recommends the use of the term “form or forms.”

**B. Including, but not limited to.**

Where CR 34 currently reads “including,” the ATJ would like to add “but not limited to.”

ATJ’s position: The ATJ believes the phrase “not limited to” will emphasize the idea that the list is not finite.

Subcommittee’s position: The subcommittee prefers to not add “but not limited to.” First, “but not limited to” is not found in either the state or federal rules. Second, adding the phrase "but not limited to" creates a redundancy: intrinsic to the word “including” is the implication of an incomplete listing. Black’s Law Dictionary defines “include” as: “To contain as a part of something. The participle including typically indicates a partial list (the plaintiff asserted five tort claims, including slander and libel). But some drafters use phrases such as *including without limitation* and *including but not limited to* – which mean the same thing.” It is the subcommittee’s position that, to avoid redundancy and maintain harmony with state and federal rules, “but not limited to” should not be included.

SUPERIOR CIVIL RULE 34  
PRODUCING ~~THE~~ OF DOCUMENTS, ELECTRONICALLY STORED  
INFORMATION, AND TANGIBLE THINGS OR AND ENTRY ONTO UPON  
LAND FOR INSPECTION AND OTHER PURPOSES

(a) Scope. Any party may serve on any other party a request within the scope of Rule 26(b):

(1) to produce and permit the requesting party, or the party's representative, to inspect, copy, test, photograph, record or sample the following items in the responding party's possession, custody, or control making the request, or someone acting on his behalf, to inspect and copy; any designated documents, electronically stored information, or tangible things - (including writings, drawings, graphs, charts, photographs, sound recordings, images, phonorecords, and other data or data compilations – stored in any medium from which information can be obtained, either directly or, if necessary, after translation by the responding party translated, if necessary, by the respondent through detection devices into reasonably usable form), or to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of rule 26(b) and which are in the possession, custody or control of the party upon whom the request is served; or

(2) to permit entry onto upon designated land or other property possessed or controlled by the responding party, so that the requesting party may inspect, measure, survey, photograph, test, or sample any in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation on it. thereon, within the scope of rule 26(b).

(b) Procedure.

(1) Service. The request may, without leave of court, be served upon the plaintiff after the summons and a copy of the complaint are served upon the defendant, or the complaint is filed, whichever shall first occur, and upon any other party with or after service of the summons and complaint upon that party.

(2) Contents of the Request.

The request:

(A) shall set forth the items to be inspected either by individual item or by category, and describe each item and category with reasonable particularity;

(B) ~~The request~~ shall specify a reasonable time, place and manner of making the inspection and performing the related acts; and

(C) may specify the form or forms in which electronically stored information is to be produced.

(3) Responses and Objections.

(A) Time to Respond. ~~The party upon whom the request is served~~ shall serve a written response within 30 days after the service of the request, except that a defendant may serve a response within 40 days after service of the summons and complaint upon that defendant. The parties may stipulate or the court may allow a shorter or longer time.

(B) Responding to Each Item. For each item or category, the response must either state that inspection and related activities will be permitted as requested or state a specific objection to the request, including the reasons.

(C) Objections. An objection to part of a request must specify that part and permit inspection of the rest.

(D) Responding to a Request for Production of Electronically Stored Information. The response may state an objection to a requested form for producing electronically stored information. If the responding party objects to a requested form or forms – or if no form was specified in the request – the responding party must state the form or forms it intends to use. ~~The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for objection shall be stated. If objection is made to part of an item or category, the part shall be specified and inspection permitted of the remaining parts. The party submitting the request may move for an order under rule 37(a) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.~~

(E) Failure to Make Discovery. For any failure to make discovery under this rule, the requesting party may move for an order as provided under rule 37.

(F) Producing the Documents or Electronically Stored Information. Unless otherwise stipulated, or ordered by the court, these procedures apply to producing documents or electronically stored information:

(i) A party who produces documents for inspection shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request;

(ii) If a request does not specify a form for producing electronically stored information, a party must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms; and

(iii) Unless otherwise stipulated or ordered by the court, for good cause shown, a party need not produce the same electronically stored information in more than one form.

(c) Persons Not Parties. This rule does not preclude an independent action or a subpoena issued pursuant to rule 45 against a person not a party for production of documents and things and permission to enter upon land.

March 16, 2011

TO: WSBA Court Rules & Procedures Committee

FROM: Rebecca S. Engrav, Subcommittee X

RE: **Subcommittee X Report**

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**A. Proposal Regarding Conforming Expert Rules to Recent Changes to Federal Rules**

Because of lack of quorum at the last meeting, we again bring to you the proposal of a member of the bar for consideration of changing Washington's rules regarding experts to match recent changes to the federal rules. Please see pages 52-60 and 96-101 of your materials from last time.

*Action Requested:* Full Committee vote on prior proposal.

**B. "Days Are Days" Proposal**

As described at our February meeting, Subcommittee X is beginning the process of considering whether to copy the counting approach taken in the 2009 amendments to the federal rules. Under the new federal approach, any short periods have been lengthened in the rules, and it is explicitly stated that "days are days," so weekends and holidays are excluded only if the last day of a period falls on a weekend or holiday. The amendments also clarify how to count "backward" when a rule specifies a deadline before, rather than after, a certain trigger, such as reply briefs due some number of days before the noting date.

The "counting backwards" issue is one that was flagged as a potential ambiguous spot in the Washington rules by some in this Committee even before the federal changes occurred. More broadly, members of our Committee have wondered if we should look at making the same changes in the Washington rules, and I am informed that a few external inquiries have come in as well.

When I reported on this in February, the intent of the Subcommittee was to go through the rules and prepare a redlined set of the necessary changes to implement such an approach, and then next year take up vetting and policy issues to determine if we should recommend such a change. At our March meeting, however, the Subcommittee decided it would make more sense to reverse order and first determine the extent of interest amongst the bar or bench in some or all of the changes in the federal package. As part of this period of gathering input and opinion, we would like to start by learning whether the full Committee has opinions on whether such changes should be considered, or if this is an "ain't broke" situation that does not a change.

For background, attached is a summary of the federal changes.

*Action Requested:* Full Committee provide input and feedback, no vote.

### **C. Proposal Regarding Non-Serviceable Attorney Addresses**

A member of the Subcommittee raised the problem of attorney addresses that cannot be hand-served. For example, if an attorney lives and works in a secured downtown building that does not have a concierge and entrance can be achieved only through being buzzed in by the tenant, it is not possible to serve the attorney when she is out or otherwise does not answer the buzzer. Other related situations can arise.

The problem does not affect only one set of rules, and also there is some overlap between the service issue and other issues related to the licensing requirement that attorneys provide their address to the WSBA. We are working with the Chair and the Committee's counsel, however, to learn to extent of prior discussions about this issue and determine which committee is the appropriate one to consider the issue.

*Action Requested:* None; update provided for information only.

# Playing by the Rules

## Federal Rules Changes

### Federal Rules of Civil Procedure

#### Time-Computation Amendments

Effective December 1, 2009, Civil Procedure Rules 6, 12, 14, 15, 23, 27, 32, 38, 50, 52, 54, 55, 56, 59, 62, 65, 68, 71.1, 72, and 81 of the Federal Rules of Civil Procedure were amended to make the method of computing time periods consistent, simpler, and clearer.

The amendments reflect a “days-are-days” approach to computing time periods. For example, intermediate weekends and holidays count when computing time periods, regardless of the length of the period. The amendments clarify (a) how to count forward when a time period begins after the occurrence of an event (service of a motion, for example) and the deadline falls on a weekend or holiday, and (b) how to count backward when the period precedes an event (a scheduled hearing, for example) and the deadline is on a weekend or holiday. The amendments also provide for computing hourly time periods (“hours-are-hours” approach) when deadlines are in hours.

Also addressed are the special timing considerations that accompany electronic filing. Unless a statute, local rule, or court order provides otherwise, the last day of an electronic filing period ends at midnight in the local time zone. Filing deadlines are extended if the clerk’s office is “inaccessible.” Courts have flexibility to define when a deadline should be adjusted or a failure to comply should be excused because of inaccessibility.

Virtually all short deadlines are extended to account for the effect of including intermediate weekends and holidays in the time period. Most periods of less than 30 days are adjusted in multiples of seven days. Consequently, deadlines will usually fall on weekdays.

The amendments specifically provide as follows:

- The one-day period in Rule 6(c)(2) is now seven days. This extends to seven days prior to a hearing the time for serving an affidavit opposing a motion.
- The one-day period in Rule 54(d) is now 14 days.

- The three-day period in Rule 55 is now seven days.
- Five-day periods in Rules 32, 54, and 81 are now seven days.
- The five-day period in Rule 6(c)(1) is now 14 days. This extends the time to serve a written motion and notice of hearing.
- Ten-day periods in Rules 12, 14, 15, 23, 38, 59(c), 62, 65, 68, 72, and 81 are now 14 days.
- Ten-day periods in Rules 50, 52, and 59(b), (d), and (e) are now 28 days. This extends the time for preparing and filing postjudgment motions.
- The less-than-11-day period in Rule 32 is now less-than-14-days.
- Twenty-day periods in Rule 12, 15, 27, 53, 71.1, and 81 are now 21 days.
- Rule 6(b)’s reference to provisions for extending the times set by provisions in Rules 50, 52, 59, and 60, and Rule 59(c)’s reference to a 20-day extension are eliminated.
- The timing provisions in Rule 56(a) and (c) are replaced by new provisions recognizing that deadlines for summary judgment motions may by local rule or court order. In the absence of a rule or order, the motion may be made at any time until 30 days after the close of all discovery. New provisions establish default times for response and reply.

### Other Amendments

#### *Rule 13. Counterclaim and Crossclaim*

Rule 13(f), which sets out standards for amending pleadings to add a counterclaim, is deleted as redundant of Rule 15, which provides standards for amending pleadings in general.

#### *Rule 15. Amended and Supplemental Pleadings*

Rule 15(a), which allows amending a pleading once as a matter of course, eliminates the distinction drawn by former Rule 15(a), under which a responsive pleading immediately cut off the right to amend, and a Rule 12 motion, which did not cut off the right and prolonged the time to amend a pleading until the motion was decided. The change allows filing an amended pleading without leave of court within 21 days after

service of a responsive pleading or 21 days after service of a Rule 12 motion, whichever is earlier. Otherwise, an amended pleading requires leave of court.

### **Rule 48. Number of Jurors; Verdict; Polling**

Rule 48(c) authorizes polling jurors individually, either on the court's initiative or in response to a party's request. If the poll reveals a lack of unanimity or lack of assent by the stipulated number of jurors, the court may direct the jury to continue to deliberate, or order a new trial.

### **Rule 62.1. Indicative Ruling on a Motion for Relief That is Barred by a Pending Appeal**

For any motion the district court cannot grant because of a pending appeal, new Rule 62.1 adopts the practice followed by most courts on a Rule 60(b) motion seeking to vacate a judgment being appealed. The district court cannot grant the motion without a remand from the appeals court. It can, however, deny the motion, defer consideration, explain that it would grant the motion if the appeals court would remand for that purpose, or identify the motion as raising a substantial issue. The suggestion for remand is typically referred to as an "indicative ruling." Requests for indicative rulings are generally made when a Rule 60(b) motion is filed after a notice of appeal. This procedure facilitates cooperation between district and appeals courts, allowing a determination whether it is preferable to decide the appeal before a ruling on the motion. A party must notify the appeals court if the district court states it would grant the motion or identifies it as raising a substantial issue.

### **Rule 81. Applicability of the Rules in General; Removed Actions**

Rule 81(d)(2) makes clear that the term "state" includes the District of Columbia and any United States commonwealth or territory.

## **Federal Rules of Appellate Procedure**

### **Time Computation Amendments**

Effective December 1, 2009, Appellate Rules 4, 5, 6, 10, 12, 15, 19, 25, 26, 27, 28.1, 30, 31, 39, and 41 were amended to make the method of computing time periods consistent, simpler, and clearer.

Amendments to Rule 26 simplify and clarify the general time-computation method consistent with the "days-are-days" and "hours-are-hours" approach reflected in amendments to the Federal Rules of Civil Procedure.

The amendments specifically provide as follows:

- Reference to "calendar days" in Rules 25, 26, and 41 are now simply to "days."
- Three and five days in Rules 27, 28.1, and 81 are now seven days.
- Seven and eight days in Rules 5(b)(2), 19, and 27 are now 10 days.
- Seven and 10 days in Rules 4(a)(5), 4(a)(6), 4(b), 5(d)(1), 6, 10, 12, 30, and 30 are now 14 days. The seven-day period in Rule 4, governing motions to reopen the time to appeal, is now 14 days.
- Ten days in Rule 4(a)(4)(A)(vi) are now 28 days. The provision specifies those Rule 60 motions that extend the time to file notice of appeal.
- Twenty days in Rule 15 are now 21 days.

## **Other Amendments**

### **Rule 4. Appeal as of Right—When Taken**

An amendment to Rule 4(a)(4)(B)(ii) addresses problems that resulted from adoption in 1998 of language referring to "a judgment altered or amended upon" a post-trial motion. The amendment eliminates this language in favor of "a judgment's alteration or amendment" upon such a motion. This is intended to make clear that an appellant is not required to amend a notice of appeal filed prior to a judgment being amended, even if the amendment favors the appellant. A new or amended notice of appeal is required, however, when the appellant wishes to challenge a judgment's alteration or amendment upon a post-trial motion.

### **Rule 12.1. Remand After an Indicative Ruling by the District Court on a Motion for Relief That Is Barred by a Pending Appeal**

This new rule, coordinated with new F.R.C.P. 62.1, sets forth the procedure for requesting an "indicative ruling" on a motion a district court lacks authority to grant because of a pending appeal. The rule facilitates remand to the district court for a decision when the

district court has indicated it would grant the motion were the appeals court to remand for that purpose, or has identified the motion as raising a substantial issue. The procedure ensures proper coordination between the district court and court of appeals. Unless the court of appeals expressly dismisses the appeal, it retains jurisdiction despite the remand and may consider the appeal even if the district court grants relief on remand.

### **Rule 22. Habeas Corpus and Section 2255 Proceedings**

The amendment conforms the rule to changes to Rule 11(a) of the Rules Governing Proceedings Under 28 U.S.C.A. §§2254 or 2255. It deletes the requirement that the district court judge who rendered the judgment either issue a certificate of appealability or state why a certificate should not issue. The relevant requirement is now set out in Rule 11(a).

### **Rule 26. Computing and Extending Time**

In addition to the changes to Rule 26 made as part of the revised time-computation approach, the Rule is modified to clarify operation of the three-day rule when a time period ends on a weekend or holiday. The change tracks the language of a similar amendment to F.R.C.P. 6.

## **COMMENCEMENT**

### **Complaint—Conspiracy—Factual Allegations—Specificity**

**42 U.S.C.A. 1983**

*Cooney v. Rossiter*

2009 WL 3103998 (7th Cir. 2009)

#### **Case at a Glance**

Post-*Bell Atlantic* and *Iqbal*, the necessity of factual specificity when alleging conspiracy is clear.

#### **Summary of Decision**

Following a court order terminating her custodial rights to her two children, plaintiff brought a §1983 action (42 U.S.C.A. 1983) against the state court judge who issued the order, the children's court-appointed representative, the attorney for her former

husband, a court-appointed psychiatrist, and a therapist for the children.

The complaint alleged that defendants conspired to deprive plaintiff of her constitutional rights. Specifically, plaintiff asserted that the children's representative "orchestrated" appointment of their psychiatrist and initiated a "witch hunt" against her. The complaint alleged "numerous other conspiratorial acts and violations" of plaintiff's constitutional rights.

Most of the defendants were entitled to absolute immunity as court officers or appointees. However, allegations against two other defendants were based on actions in their private capacities. Thus, they were potentially liable under §1983, but only if plaintiff could prove they had agreed with a state officer to deprive her of constitutional rights. See *Fries v. Helsper*, 146 F.3d 452 (7th Cir. 1998).

A bare allegation of conspiracy is not sufficient to survive a motion to dismiss for failure to state a claim. See *Loubser v. Thacker*, 440 F.3d 439 (7th Cir. 2006). The heightened pleading requirement for conspiracy is a narrow exception to F.R.C.P. 8's notice pleading standard—"a rare example of a judicially imposed requirement to plead facts in a complaint governed by Rule 8."

The Supreme Court addressed pleading requirements in two recent cases. In *Bell Atlantic Corp. v. Twombly*, 550 U.S. 554, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007), the Court held that in complex litigation, a complaint will survive dismissal only if it makes "plausible allegations." *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009), 09 Fed Lit 174, extended the *Bell Atlantic* rule to litigation in general. See *Brooks v. Ross*, 578 F.3d 574 (7th Cir. 2009).

The Court's specific concern in *Bell Atlantic* was the discovery burden to which implausible allegations subject a defendant, "perhaps ... merely to extort a settlement that would spare the defendant that burden." In *Iqbal*, the concern was the consequence of implausible allegations for a government defendant, specifically the burden of trial.

Pointing to *Bell Atlantic* and *Iqbal*, the Seventh Circuit said the "height of the pleading requirement is relative to circumstances." Plaintiff's case was not complex and the two defendants did not claim immunity. Nevertheless, the Seventh Circuit described the case as possibly "paranoid pro se litigation" that arose out of a custody fight and involved allegations of a vast conspiracy. Before defendants became entangled in discovery, plaintiff should be required to satisfy a high standard of plausibility.