

Meeting Minutes March 15, 2010

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

Members present: Roy Brewer (by phone), Mario Cava, Tony DiTommaso, Jr., Rebecca Engrav, Hillary Evans (by phone), Paul Henderson (by phone), Horace Lee (by phone), Barbara McInvaille (by phone), Todd Nunn (by phone), Bryan L. Page (by phone), Christopher Rao, Hon. Rebecca Robertson, Karl F. Sloan (by phone), Dave Trieweiler, Neil Wachter, and Hon. Blaine Gibson. Also attending were Roger Leishman (BOG Liaison), Don Horowitz (ATJ), Allison Durazzi (WSBA Justice Program Coordinator), Nikole Hecklinger (SCRAP), Mike Katell (ATJ), Jay Gairson (by phone, ATJ), Nan Sullins (AOC Liaison), Elizabeth Turner (WSBA Assistant General Counsel) and Anna Schmidt (WSBA Paralegal).

<u>Minutes</u>

The minutes from the January 11, 2010 meeting were approved by consensus.

Chair's Report: Mr. Masters welcomed Neil Wachter as the new Criminal Rules Subcommittee chair and thanked Judge Rebecca Robertson for her work as chair of the Subcommittee, and explained that since she is now a judge she can no longer serve as chair but will continue to work with the committee

Mr. Masters introduced the following guests from the ATJ Don Horowitz, Allison Durazzi, Jay Gairson and Mike Katell.

Also, the Chair reminded everyone who would like to be reappointed to the Committee next year to send in an application, even though it is after the deadline.

Old Business

None

New Business

ESI Subcommittee:

Mr. Nunn reported that they await a draft of proposed changes to the ESI rules approved by the Committee from the ATJ Technology Subcommittee. Mr. Horowitz (of the ATJ Technology Subcommittee) stated that they were working on the rules in a piecemeal fashion. That is, they're working on separate drafts. The first draft, which will be submitted to Mr. Nunn today, is on CR 34 (Production of Documents). They will next work on CR 26 (General Provisions) and CR 45 (Subpoenas). The ATJ Technology Subcommittee has involved the Superior Court Judges in early discussions regarding these proposed changes and asked them to voice any concerns in advance. One of the areas the judges are particularly concerned about the format of document production covered in CR 34. Failure to have clear rules in this area results in unnecessary hearings.

Mr. Katell stated that the ATJ Technology committee is very excited to have the opportunity to connect on these proposed rule changes and looks forward to doing more of this type of collaboration.

Mr. Masters stated that working on the changes in a piecemeal fashion is good because there is a massive amount of material involved in these proposed changes. He explained to the Committee that CR 34 is at the top of the agenda because trial judges have expressed that they would really like a rule that deals with the formatting up front. Mr. Horowitz agreed and discussed the difficulty of having to balance it so that it feels fair to all sides. Ms. Durazzi asked whether there are deadlines involved in these proposed changes. Ms. Turner explained that the Court Rules Committee usually reports to the BOG at their June or July meeting. Mr. Masters stated that quality work is worth waiting for. Mr. Leishman suggested that they present their proposed changes (or those they've made up to that point) at the June BOG meeting, which is combined with the ATJ conference. It would be very helpful since the ATJ committee is already at that meeting. Mr. Horowitz agreed that that was a very good idea.

Criminal Rules:

Mr. Wachter explained that, when talking about a particular criminal rule, his intention is also to discuss the corresponding limited jurisdiction rule. Mr. Wachter also made a correction to his written memo that, with regard to CrR 4.11, the court hasn't asked us for further scrutiny of the rule, but rather to scrutinize the comments the court received.

<u>CrR 4.8 (The Subpoena Rule)</u>: Mr. Wachter reported that the Court Rules Committee spent a considerable amount of time working on the civil Subpoena rule; however, there's been a lingering question of how to deal with a subpoena in a criminal matter. The default has been to look at the civil rules, which was to give notice to all parties for witness testimony or for records (as discussed *State v. White*, 126 Wn. App. 131). In

2007 the Committee approved two versions of CrR 4.8 for submission to the BOG; one was a "defense" version and one was a "prosecutors" version. The Committee vote was very close, so the Committee asked the BOG to send both rules to the Court, with a request that the Court decide the underlying policy issues; however, the BOG voted to send only the defense version to the Court. The Court received a substantial number of comments on the published "defense" version, and has asked us to comment on the comments. The Subcommittee began its work by taking another look at both versions of the rules. Mr. Wachter attached to the materials both versions of the rule that were submitted to the BOG. There was interest in the Subcommittee to work on both versions of the rule again and the Subcommittee was considering asking the Committee to once again ask the BOG to send them both up to the Supreme Court.

Ms. Turner explained that Mr. Wachter is correct that the BOG voted to submit the Defense version to the Supreme Court, who then published that version, received comments, and sent the rule back to us with a request for the committee to comment on the comments. Ms. Turner advised the committee against going back to the BOG and asking them again to send both versions to the Supreme Court, since the BOG had already declined to do that. Instead, she advised that the Committee should review the comments and then comment on them to the BOG.

Judge Robertson explained the Subcommittee's reason for wanting to send both versions again to the Supreme Court, which is that there is an important policy difference regarding which version is more appropriate. Although the Committee and BOG cannot agree on which policy is more appropriate, the Supreme Court may want to make that decision. Mr. Trieweiler stated that defenders believe there is a fundamental duty not to disclose certain information to the prosecution, which is why they don't want to provide notice for every piece of discovery sent out. Mr. Rao asked when before trial would notice be given. Mr. Wachter explained that it is only if a certain piece of evidence is going to be used in trial that notice is given, and that usually all information used during the trial has been exchanged about a month prior to the trial. Ms. Engrav asked what communication, if any, has been received from the Supreme Court. Ms. Turner responded that the Supreme Court requested, in an email from Ms. Sullins, that the Committee review the comments and comment on them.

Mr. Masters clarified that the question before the Committee is whether we want to resend the two rules again to the BOG. Ms. Engrav opined that, in commenting to the comments, perhaps we should attach both versions of the rules to the response letter we send to them. Ms. Turner explained that all the comments to the comments would also still need to go back to the BOG because the Court Rules Committee speaks through the BOG, and that the BOG may perceive that as being an attempt to get in through the back door that which it would not approve for formal submission. Ms. Turner reminded the committee that "commenting on the comments" is actually an opportunity to both respond and to make any necessary fixes that may have been missed, and gave the example of CR 45, where one of the comments was that the form

was missing a place to state the means by which the deposition is to be made, as required by the rule; the committee fixed that when responding to the comments.

Judge Gibson pointed out that the comments raised the question of the potential for abuse of the subpoena process by the defense if no notice were required. Judge Gibson stated that, in theory, that could happen, but in reality such abuse would almost never occur. The only two instances he could think of is a self-represented defendant with a lot of time on his hands or a wealthy defendant who could give his counsel an unlimited amount of money – however, these are two rare circumstances and CrR 4.8 gives the prosecution a chance to stop blanket subpoenas.

Mr. Leishman opined that, reading between the lines, it's the third party concerns that seem important. He feels the discussion of the policies and how they might affect third parties should really be addressed.

Mr. Sloan respectfully disagreed with a comment regard the workload caused by giving everyone notice because subpoenas do not take much time to generate. Without a provision requiring notice, opposing counsel would not necessarily get notice and a third-party may also not have knowledge or time to give the prosecutor notice. Mr. Sloan feels there is an obligation to reciprocate giving notice. Trusting that someone would notify them in a timely manner, if it's not in the rule, wouldn't necessarily work.

Ms. Hecklinger stated that, as a defense attorney, she has never seen any of her colleagues commit abuses regarding subpoenas and, with regard to hospitals, there are already certain statutory procedures obligations that they must follow to receive records. Procedures to get certain records are very strict, and often require consent of the patient. There are numerous protections in place already, which should be expressed in the Committee's comments.

Mr. Trieweiler opined that fears about defenders abusing the subpoena rule are unfounded and there are already rules for frivolous pleadings. He reminded the Committee that hospitals process a lot of subpoenas and have procedures in place. If they feel something is frivolous, they have the capability to responding to the issue in an intelligent manner. The question is not whether a subpoena can be issued but whether the defender must give notice for every subpoena that's issued.

Mr. Wachter stated that his intention is to root through the comments and try to develop some text that would respond to the different concerns, and to set out the fundamental difference held by prosecutors and defense attorneys. Mr. Wachter feels the history is useful to outline in the comments. Ms. Turner explained that this whole "comment on the comments" thing is relatively new, which is why we now have meetings scheduled throughout the summer if it is necessary to respond to the court more quickly rather than waiting until the committee starts up again in October

Mr. Wachter continued his report on the next rule: CrR 4.11. CrR 4.11 would be a new rule. Mr. Wachter cited some history, which came about because of a desire to create a more formalized rule of how defense witness interviews are memorialized. Mr. Wachter explained that depositions are rare in criminal matters; however, there has been a request to recognize the right to record an interview, so the Subcommittee is looking for some direction. The Subcommittee has worked on trying to clean up the rule. This rule was proposed by the Supreme Court, who declined to adopt it and did not formally ask the Committee to comment on the comments they received.

Mr. Wachter explained the materials [pp. 135 - 136] set out the rule as it was proposed and published by the court. Part A is a general right of how the interview is memorialized; part B is the "providing copies" part; part C alerts the witness as to what is going on and that the witness has a right to obtain a copy of the recording. The Subcommittee doesn't believe part A or C need to be revised any further, only part B. The intention is to address notice. The general concern being voiced in the comments is that victims should have some say in what is being done during their interviews and in how those interviews should be memorialized. Mr. Wachter explained that the subcommittee has tried to improve the rule based on the comments. Mr. Wachter brought a motion to amend the rule as it appears in the materials [p. 136].

Mr. Trieweiler explained that the Supreme Court sent this rule back to the Committee twice to comment on the comments, then voted on this rule and decided not to pass it. Thus, CrR 4.11 is a rule that the Committee would submit to the BOG to re-propose to the Supreme Court. Ms. Engrav questioned whether the Supreme Court would accept it if nothing substantive has changed in the proposal. Mr. Trieweiler stated that, since this proposed change first came before the Supreme Court six years ago, there is a body of experience that now exists addressing the concerns expressed in a lot of the comments: specifically, that recording interviews is traumatic and that the witness has a right to refuse it. This body of evidence refutes the concerns that were addressed, making them unfounded. Judge Robertson agrees with Mr. Trieweiler. As a prosecutor she would have preferred to have every single interview recorded. It is a better mode of practice to have recorded witness interviews and has never seen this abused by counsel. Mr. Rao suggested changing the last added sentence to "Except as otherwise provided under the Court Rules..." Mr. Wachter accepted Mr. Rao's suggestion as a friendly amendment.

Mr. Sloan stated that from a prosecution standpoint, they like to have tape recorded comments as well. Witnesses do have a right not to participate in an interview, this protection is under Rule 4.6. Judge Robertson stated that, if victims refuse to be recorded during an interview (or if they refuse to be interviewed), the issue would before the court where the witness would explain why and the judge would determine whether the witness will be deposed. Mr. Trieweiler stated that the Subcommittee tried very hard not to affect other rules by making changes in this rule.

Ms. Turner questioned whether this rule has been vetted with victim's rights groups and other stakeholders. She stated that these groups are becoming a stronger presence in asserting their right to be at the table when such changes to rules are made. Mr. Wachter stated that they haven't recently vetted this proposed rule with those groups, and suggested addressing only the language today, then voting on the proposal as a whole at a later meeting. Mr. Wachter also proposed to change the words "tapes and CD's" to the word recordings, as now we have technology that goes beyond tapes and CDs. To be consistent, Mr. Trieweiler felt the Subcommittee should look over the entire rule. Mr. Wachter withdrew his motion, and the committee will continue towork on the language and will vet the rule with victim's rights groups.

Mr. Wachter also wanted to alert the Committee on the status of CrRLJ 4.1 (the Arraignment Rule), which has been published for comment. This rule follows a previous rule that originated with the WSBA Council for Public Defense ("CPD"). The current proposed rule was put forth by the DCMJA, and has a comment period ending on April 30, 2010. Because this is something that has previously been handled by the CPD, this committee will not be working on it unless specifically asked to do so. Mr. Wachter wanted the members to know so that they can comment if they would like to.

Subcommittee X:

Ms. Engrav reported that Subcommittee X is proposing to not move forward on a suggestion to amend ER 804. This proposed rule, which has to do with when "hearsay" evidence is admissible, came up in a criminal case (State v. Mason) where the court decided that the defense could not object to the hearsay rule after having made the witness unavailable. At Karl Teglund's suggestion, Judge Gibson proposed the change following Mason. After discussion with defense attorneys and prosecutors, the subcommittee decided that, given the case law in this area and as no groups have come forward stating such a change is needed, it doesn't appear appropriate under our committee's long-standing "if it ain't broke, don't fix it" policy. Federal case law (State v. Mason) is the law with regard to this issue, whether the rules are changed or not. In response to the question of which groups they contacted regarding this proposed rule change, Ms. Engrav listed King County Prosecutors' organization and the King County defense organizations. Mr. Wachter asked whether they consulted WAPA. Ms. Engrav stated that they didn't; however, WAPA could still make a proposal concerning this rule change. Judge Robertson stated her initial thought was that this rule makes sense, especially for new practitioners. Ms. Engrav stated that they discussed in the Subcommittee that the rule itself doesn't actually answer the question and practitioners must also still look at the case law. Thus putting this rule in may make the decision appear simpler than it is. Mr. Wachter opined that he would favor getting the input of WAPA. He explained that the doctrine of forfeiture by wrong doing is a common law doctrine; however, a number of the codified exceptions to the hearsay rule have come about because of the common law treatment. He would favor kicking this over and getting some statewide treatment of this topic as there may be some interest in codifying it. Judge Gibson stated that this is an area that is in flux right now and it

doesn't make sense to adopt a rule that may be wrong by the time the Supreme Court adopts it. Thus, it makes sense to wait a few years.

The Subcommittee's motion to not move forward on the proposed rule change passed with 12 in favor and one opposed.

The meeting adjourned at 11:22 a.m.