



# WSBA

## COURT RULES AND PROCEDURES COMMITTEE

### Meeting Minutes March 21, 2011

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

Members present: Peter Banks, Lincoln Beauregard, Roy Brewer, Mario Cava, Paul Crisalli, Rebecca Engrav, Hillary Evans, Beth Fraser, Justo Gonzalez, Paul Henderson (by phone), Jeannie Mucklestone, Bihn T. Nguyen (by phone), Bryan Page, Shannon Ragonesi (by phone), Rachel Reynolds (by phone), Aaron Rocke (by phone), Karl Sloan (by phone), Derek Smith, and Ann Summers. Also attending were Judge Kevin Korsmo (by phone), Judge Blaine Gibson, Nan Sullins (AOC Liaison), Marc Silverman (BOG Liaison), Nikole Hecklinger (SCRAP), Don Horowitz (by phone, ATJ Technology Subcommittee), Allison Durazzi (ATJ staff liaison), Elizabeth Turner (WSBA Assistant General Counsel) and Anna Schmidt (WSBA Paralegal).

Chair Ken Masters began the meeting by introducing a new subcommittee chair: Mario Cava will chair the Evidence Rules (ER) Subcommittee.

### **Minutes**

The October 18, 2010 meeting minutes, which the Committee was unable to approve at the previous meeting due to lack of a quorum, were approved by consensus.

The February 28, 2011 meeting minutes were amended by Rebecca Engrav (changes were emailed to Anna Schmidt), Judge Gibson and chair Ken Masters. The February 28, 2011 meeting minutes, as amended, were approved by consensus.

### **Chair's Report**

*RAP 18.13A Subcommittee:* Mr. Masters reported that, as discussed at the last meeting, a recent proposed amendment submitted by the Office of Public Defense (OPD), was published for comment by the Supreme Court. This proposal ensures the appellate court's ability to decide termination appeals prior to the adoption of children, who are the subject of the litigation. Mr. Masters created a subcommittee to review this proposal, which includes Judge Craighead and Sean Flynn (OPD), along with others who are both currently serving on the Committee and some who are not. Mr. Masters went before the BOG last week (at their March meeting) to give them a heads up that

the Court Rules Committee is moving forward with reviewing this proposal. The current deadline for the Subcommittee to make recommendations is April 30, 2011, but they may need to ask for more time if a “rewrite” is proposed. Mr. Masters will let Ms. Sullins know if more time is needed. The subcommittee will come to the larger Committee before taking their recommendations to the BOG at the BOG’s April 29 meeting.

### **Subcommittee Reports**

*ESI Subcommittee:* An email from Don Horowitz (ATJ Technology Subcommittee) was distributed to Committee members. Mr. Horowitz stated that one more meeting with ESI Subcommittee Chair Hillary Evans will hopefully bring the ATJ Technology Subcommittee and the ESI Subcommittee to agreement on the majority of the proposed changes regarding electronic discovery to the rules. Mr. Horowitz questioned why CR 34 was scheduled for Committee action at this point when there are still issues that the ATJ Technology Subcommittee is working on with the Subcommittee. Mr. Horowitz explained that once the Subcommittee and ATJ Technology Subcommittee were in agreement, he would then take the proposals to the judges and the ATJ for approval. Mr. Masters clarified that we’re not voting on the rule today, but he is worried that things are getting backed up, and that there were specific issues that the Subcommittee wanted the full Committee to address. Mr. Horowitz explained the two issues that are before the Committee today: there are specific words that, according to Mr. Horowitz, are important and need to remain within the rule.

*First Issue: Form vs. Format:* Ms. Evans, the Subcommittee Chair, reported that the Subcommittee has been working hard with ATJ Technology Subcommittee to come to an agreement. The two issues that are sticking points, keeping them from moving forward, are grammatical. There is a section that mentions “tangible things,” and both ATJ Technology Subcommittee and the Subcommittee have agreed to omit the word “tangible” because the term “things” applies both tangible and intangible.

Ms. Evans explained that both the state and federal rules use the term “form or forms,” which is a term describing the manner of production the party making the request needs the discovery to be in. ATJ Technology Subcommittee is concerned that the word “forms” doesn’t cover everything the term needs to cover, and that the word “format” would be better word to use where a party may want, for example, discovery in a pdf versus a word document. Ms. Evans explained that the Subcommittee’s research shows the courts aren’t that technically advanced and that the terms “form or forms” will usually cover format. Other states also use the term “form or forms”. The subcommittee is satisfied with this term.

Mr. Horowitz disagreed, explaining that the rules have to serve the public and judges, as well as lawyers. Under the current rules, there are too many hearings when the rules aren’t clear and need interpretation. Mr. Horowitz explained that, technologically, format is different from form. Bringing the rules up to date is one of the reasons we are reviewing this rule again. Nationally, in technology circles, the word “format” is used to request a specific type of electronic file. ATJ Technology Subcommittee is concerned

that leaving the word “format” out of the rule will confuse the general public. “Form” doesn’t tell you what the electronic format is. Mr. Horowitz explained that there is no reason to not to use this term.

Ms. Evans explained that, according to their research, format is included in the term “forms.” She is also concerned with creating inconsistency with the federal rules, since in the GR 9 cover sheet we have been recommending that federal authority be used as a guide in interpreting and applying our state rules.

Judge Gibson opined that Mr. Horowitz is absolutely correct that the term “format” has its own specific meaning, and agreed with ATJ Technology Subcommittee’s preference to use the terms form and file format (he also preferred adding the word “file” to the rule). Ms. Summers questioned whether, if one side requests a format that the office providing the request may not have, would it create a burden to the office providing the request. Ms. Engrav opined that she’s troubled going against what other states and the Sedona conference have done. Mr. Crisalli questioned that the plural use of the term, that is “forms,” has any significance. Ms. Hecklinger opined that, as she works in a small nonprofit, she’s worried that one party may not be able to address a specific form request. Ms. Durazzi (ATJ staff liaison) reported that ARMA (an international association of records and information management, which issues standards and best practices) has a standard that states if you store files in a specific format, you must also retain the device to read those files. Discussion ensued on whether there is a downside to creating a new state rule that shifts the language away from the federal rule and what other states have done, and whether shifting the language may invite confusion and create disputes between parties. Mr. Gonzalez opined that a party must produce the documents “as they’re kept in the ordinary course of business.” Thus, there is clarity as you read the rule as a whole.

Mr. Silverman agreed with Mr. Horowitz and Judge Gibson about clarifying in modern language what is necessary. He explained that we wouldn’t have separate state rules if the federal rules were always proper. Ms. Evans answered that the term “form” does include the physical manner in which something is produced. However, the Subcommittee will do more research on this issue. Ms. Evans explained that the opportunity to object to how discovery is produced also exists in the proposed rule. The burden of responding, and stating that they don’t have a specific format available, is placed on the responding party.

Ms. Evans stated that the Subcommittee would like to move to use the term “form or forms.” The motion passed, with a 10 to 4 vote and two abstentions. Mr. Horowitz asked whether they would consider a comment. Ms. Turner explained that the Committee has, in the past, not supported adding comments to the civil rules, but he should talk to the ESI Subcommittee

*Second Issue: Including, but not limited to:* Ms. Evans explained the second issue is that the Subcommittee has found the phrases “but not limited to” and “without limitation” to be redundant phrases. The Subcommittee prefers to leave out the phrase “but not

limited to.” Mr. Horowitz stated that there are cases in some states where, unless you state without limitation, then it is limiting. Ms. Evans stated that this rule should be consistent with what’s done in the other Civil Rules (not just what’s done in the ESI rules). Mr. Cava would support keeping the rules the way they are and not making too many changes. Judge Gibson pointed out that the rule may already contain a phrase (“and other data...”) that basically states this idea. Mr. Horowitz’s concern is to ensure that we don’t have unnecessary challenges or hearings and doesn’t see any harm to adding this phrase. Ms. Evans stated the Subcommittee’s motion is to use the phrase “including” but not use the phrase “without limitation.” The motion passed by 15 to 1, with one abstention.

*Evidence Rules (ER) Subcommittee*: Chair Mario Cava summarized the Subcommittee’s March 16, 2011 meeting. Members submitted an electronic vote on ER 501, and whether it should include a reference to the two cases that are cited in the rule. Of the different privileges that are provided, the journalist’s privilege is the only one that cites to case law (the others do not). The question is whether to cite to these two cases (*Senear v. Daily Journal American*, 97 Wn.2d 148, 641 P.2d 1180 (1982) and *State v. Rinaldo*, 102 Wn.2d 749, 689 P.2d 392 (1984)) and to the statute. The Subcommittee agreed that citing to the statute only is appropriate, which is their motion.

Mr. Cava reported that Ms. Summers was the only Subcommittee member who disagreed with this motion. She is concerned that even using Westlaw to search cases specific to journalistic privileges may not bring up these specific cases. Mr. Stahl expressed that he is in support of the motion of citing to the statutes only and questioned whether case law provide a more specific definition of what is “news media” than the statute. The two cited cases do not address this definition; thus, it doesn’t make sense to include citations to these cases. Mr. Crisalli explained his position is consistent with the existing 501 rules. Ms. Summers explained that this is a very new statute and there is a common law privilege, which was recognized by the state supreme court in the 1980’s. She doesn’t think this rule supplants that common law privilege. As a practitioner, Ms. Summers thinks she would want to analyze this privilege under both the common law and statute privilege. Mr. Cava isn’t asking for any action to be taken at this meeting. The committee members have time to review the report. The issue is that the privilege includes both common law and a statutory rule. Other privileges listed in ER 501 may also have both common law and statutory privileges – thus, should they cite to those cases as well to create consistency? Mr. Cava suggested considering that option as well. The vote on the Subcommittee’s motion will occur at the next meeting.

In response to Ms. Engrav’s question of whether those who put the statute forward found the statute co-extensive with the common law, Mr. Crisalli stated that his research didn’t find any evidence that the intended to abrogate the common law. Mr. Silverman pointed out that ER 501 is different from every other Evidence Rule because it just lists the statute. He stated that if the Subcommittee referenced cases for the other privileges, it would create a long rule that would constantly need to be amended.

Subcommittee X: Ms. Engrav reported on three matters.

*Expert Rules*: The first matter is a vote on a proposal to the Expert Rules (CR 26) brought before the committee last meeting, which would conform state rules to the Federal rules (FRCP 26). Ms. Engrav explained that the subcommittee as a whole felt that any change to the state rules would be premature. The subcommittee moved to table proposal at this point. The motion passed by unanimous consensus.

*“Days are Days” proposal*: The second issue is the “Days are Days” proposal discussed at the last meeting. This proposed change arises from 2009 changes to the federal rules and would be pretty extensive, requiring the Subcommittee to redline a fairly large portion of the Washington rules. The Subcommittee suggested that the group do some initial outreach now and see the reaction before putting in the work of redlining all of the rules. The Subcommittee would like to know what the Committee’s thoughts on going forward would be. Judge Gibson stated his concerns about undertaking the massive project that would be required just to conform our state rules with the federal rules, which he doesn’t believe is a good enough reason to make any changes to the rules. He reminded everyone that the Federal system is different than the state system and that the rules are all lengthened in the federal system due to their changes. Judge Gibson stated his concern about the potential impact on family law practitioners and explained that only a handful of attorneys practice in both federal and state court – thus, this would require a lot of people to learn new rules and only be beneficial to a handful of people. Mr. Silverman agreed with Judge Gibson’s opinion and could not see the Board of Governors endorsing these enormous changes without there being a very strong reason for doing so. Mr. Masters commented that he knows several people who practice in Idaho and love the uniformity of the seven day counting (it eliminates a lot of traps). Also, the federal rule does deal with the counting backwards problem. Mr. Masters asked the Subcommittee to talk amongst themselves.

*Non-serviceable Attorney Addresses*: The third issue was brought up by a Subcommittee member, and deals with attempting service in a secured building. Ms. Engrav spoke with Ms. Turner on this issue and is trying to determine whether this issue should be looked at by our Committee or by other bar entities. Ms. Engrav will continue to work on this and bring it back to the Committee.

Ms. Turner explained that, regarding the “Days are Days” proposal, they will also be reaching out to stake holder groups. She asked the Committee members to do the same.

The meeting adjourned at 11:15am.