



WSBA

COURT RULES AND PROCEDURES COMMITTEE

Meeting Minutes February 27, 2012

Committee Chair Ken Masters called the meeting to order at 9:35am.

Members present: Chair Ken Masters, Steven Buzzard (by phone), Mario Cava, Leslie Clark, Paul Crisalli, Anthony DiTommaso, Jr., Rebecca Engrav, Hillary Evans (by phone), Elizabeth Fraser (by phone), Dale Johnson (by phone), Shawn Larsen-Bright (by phone), Nicole McGrath, Bryan Page (by phone), Aaron Rocke, Ann Summers, Hon. Kevin Korsmo (by phone), Hon. Blaine Gibson, and Hon. Rebecca Robertson. Also attending were Marc Silverman (BOG Liaison – by phone), Elizabeth Turner (Assistant General Counsel), and Anna Schmidt (WSBA Paralegal).

Minutes

The January 23, 2012 meeting minutes were approved by consensus, with a few minor changes requested via email by Rebecca Engrav.

Chair's Report

Old Business: Chair did not have any old business. Ms. Turner reminded the members of the pending referendum and asked everyone to vote. For further information, please see the webpage on the referendum.

Subcommittee Reports

CR/CRLJ Subcommittee

- CR/CRLJ 5: Subcommittee Chair Rebecca Engrav reported the group met again regarding the subcommittee's proposed changes to this rule and discussed some new issues and feedback received. The current proposed CR/CRLJ 5 is slightly different from the last meeting. Specifically, the subcommittee replaced language regarding the meaning of alternative service. Some of the reasons for the subcommittee's proposed changes are discussed in the cover memo. Ms. Engrav explained that the certificate of service needs to describe the circumstances of why this alternative service was used, giving the judge adequate information to make a decision if service under this provision is

challenged. The Subcommittee also considered and resolved to its satisfaction whether the person being served would have adequate time to respond, and whether this proposal is consistent with the section of CR 6 allowing additional days after service by mail in some situations.

Ms. Nelson requested that, in the section stating that the papers must also be emailed or faxed, that the language state it should be done “on the same day” as the service. Judge Gibson felt the term “during business hours” could be interpreted in such a way that attorneys whose offices are open at different hours each day could still state their offices “are open during regular business hours.” Mr. Rocke questioned whether the problem this proposed rule change was addressing is already addressed in CR 6(b), which sets forth a procedure for extending time. Mr. Silverman questioned whether the lawyer who is serving the papers could make a special motion to the court in order to get his papers served. Judge Robertson suggested defining what regular business hours means. Mr. Cava questioned whether those offices that are closed on some holidays, ones not falling under a court holiday, would need to prove that their office is normally open during regular business hours.

Ms. Engrav responded that the subcommittee hasn’t specifically looked at CR 6(b) to date, but looking at it now she doesn’t feel that this rule truly addresses the problem because it’s not that the serving party needs more time, it’s the actual process of being able to serve the other party that is difficult. Plus, CR 6(b) can be cumbersome. This proposed rule is something that can be used without getting special permission from the court, whereas CR 6(b) requires a motion. Regarding the question of those who have irregular business hours, Ms. Engrav explained the serving party could also use this rule during a time when an office is closed, such as the Friday before Memorial Day, even if that office is normally open on business days (thus, it could be used for offices that are habitually closed or just occasionally closed on a regular business day that isn’t a court holiday). The Subcommittee discussed specifying what “regular business hours” means, but knew there are variations from county to county and decided against adding a definition.

The Chair stated his concern that the language as drafted creates an ambiguity – because you could read the language to mean that if the office is closed regularly during lunch, then it is closed during business hours and you could use this rule. His concern is inconsistent results/readings of the rule in different courts. Judge Gibson pointed out that we have no idea how the Court of Appeals would interpret this rule, which, coupled with inconsistent results from trial courts, could make the situation even worse. Ms. Engrav explained they used the term “business hours” because they didn’t want to make the rule unduly and overly specific; but she expressed understanding that Judge Gibson and the Chair were raising an issue of whether the trigger for use of this new provision would be if the office were closed during “all or some” of business hours. Mr. Cava asked if the subcommittee considered stating “service during the court’s business hours” or the court’s operating hours. That would leave an expectation of the offices being open when the courts are open. Ms. Engrav questioned if that might be problematic because of all the court furloughs occurring recently.

Ms. McGrath (CR Subcommittee member) stated that they looked through other court rules to see where the term “business hours” was used. The term is used in other rules, without being defined, such as CR 78. She suggested the Subcommittee could try to find if there were challenges with using that term. She felt the Subcommittee was trying to craft a rule that is consistent in all jurisdictions, where the practice of law may differ from one jurisdiction to the next. Thus, she concluded perhaps the Subcommittee should take a second look at this rule.

Judge Korsmo (CR/CRLJ Subcommittee member) stated the Subcommittee didn’t want to punish the server by making them have to go to Court to seek alternative ways of service. Also, the individual being served will receive the pleading by fax and email as well. Mr. Runyan , who had participated in the Subcommittee’s work, stated that the subcommittee discussed all these variations and decided that business hours differ so much that it’s better not to define the term. The Chair suggested more examples in the GR 9.

Judge Gibson suggested that an office not open regularly somehow be required to give notice to those who would normally serve them. Ms. Engrav explained that there were two different examples of those who are difficult to be served: those who work remotely, and those working in a sort of office that doesn’t have access (sometimes in order not to be served). Mr. Rocke brought up the fact that the attorney who is serving the paper may not know in a timely way that the service couldn’t be completed, but several members stated that the attorney serving the paper would need to make sure they let the person actually doing the service inform them know right away if someone can’t be served.

Ms. Nelson disagreed with putting the burden on the person being served to inform everyone of when they cannot be served. Mr. Cava suggested eliminating the phrase “during business hours” completely. Ms. Engrav stated that they discussed this, but didn’t want the serving party to feel obliged to have to camp out all the time in order to serve someone. Mr. Silverman opined that when you are a lawyer, there are common sense things expected of you, such as having normal business hours during the day so that you can receive documents (this shouldn’t vary based on where you live). He thinks this rule should be extended to anyone whose hours vary from that norm and that the default should be to uniformity in all 39 counties. Ms. Fraser agreed with Mr. Silverman. She stated that she is a public defender, but believes that uniformity is very important and could be defined in the rule. Judge Gibson stated that CR 10 describes that every pleading must contain a mailing address and feels that they can simply go to that address, tape the pleading to the door, and then state that service has been made. Discussion ensued, though, as to what options the server party has if the opposing party’s pleadings state a P.O. Box as the mailing address.

Ms. Engrav decided to take this rule back to the Subcommittee for further discussion.

- CR/CRLJ 62(b): Ms. Engrav explained that this proposed rule change [pp. 88-90] brought by former chair Roger Wynne updates the language in CR and CRLJ 62(b). The Subcommittee moved to adopt these proposed amendments, and the motion passed unanimously.

Subcommittee X

- CrR 4.6: Subcommittee Chair Cava reported that they've been reviewing proposed changes to CrR 4.6 suggested by the SCJA, which would allow a deposition to be ordered for good cause and authorizing tape recording of witnesses. The Court's deadline for comments is April 30. The Subcommittee sent out a letter to additional stakeholders [pp. 96 – 99] inviting them to a Subcommittee meeting on February 2, 2012. Several people sent in comments, and Dave Trieweiler (Defense Counsel) attended the meeting in person. The Subcommittee discussed an alternative proposal to the rule. A second Subcommittee meeting convened on February 14th, which didn't have a large turnout. They discussed having a second alternative proposal, which would contain "good cause" requirement but omits the recording authorization. Thus, if there is good cause to have a deposition, the court could order it. Ms. Turner pointed out that the proposed letter to the court [p. 98] would not contain the second to the last sentence because there wouldn't be a GR 9 included with the proposed alternative rule since we are making the proposal in a comment on another entity's proposed amendment. Mr. Cava moved that the Committee approve the proposed letter to Judge Madsen [pp94-95], with the second to the last sentence struck out, and the proposed alternative rule [p. 93], as recommendations to the BOG. Mr. DiTommaso seconded the motion.

Mr. Rocke questioned if the person seeking the deposition must pay the costs of the deposition. Mr. Cava stated they didn't want the parties being deposed to have the burden of paying for the deposition. Ms. Engrav opined that the term "good cause" didn't seem clear. Mr. Cava explained the Subcommittee looked at rules in other jurisdictions and felt this version was broad enough to apply in other instances and give the court the ability to decide when good cause exists. Ms. Engrav pointed out that this wouldn't stop the court from determining that there is good cause to depose the victim. Mr. Cava pointed out that "good cause" creates another opportunity for when a deposition could be ordered. The individual seeking the deposition would need to explain why they need this transcript, and the judge makes the ultimate decision. Judge Robertson opined that the ultimate result will be that, even in the case of a cooperating witness, this rule will probably be used. Judge Gibson didn't feel that most defense attorneys would ask for a deposition unnecessarily if they didn't really need it due to costs. He thinks it will help solve the *Mankin* issue (allowing Defense to request a deposition from an officer who is unwilling to cooperate in an interview). Mr. Silverman pointed out that *Mankin* was just a request to interview an officer, not to take an interview under oath. Ms. McGrath questioned whether the witness being deposed would be able to seek a protective order - especially for witnesses who are victims trying to avoid a pro se defendant from interviewing them. Mr. Cava stated that there's

nothing to prevent a prosecutor from moving to prevent the victim from being deposed by the pro se defendant.

The motion passed by 12 to 3. This will go to the BOG in March for first read and will be voted on at their April meeting.

PRP Subcommittee

Subcommittee Chair Ann Summers reported that their Subcommittee met to discuss two competing rule change proposals: WACDL proposed 20 changes to the rules pertaining to RAPs dealing with Personal Restraint Petitions, while WAPA counter-proposed some additional changes. The Subcommittee believes they will be able to determine where there can be some consensus by April, but Ms. Summers isn't sure that that is realistic time line. The Chair explained that it's better to put these forward during the regular RAP cycle, when the Court of Appeal's Subcommittee will be ready to look at them. Ms. Summers envisions that their work product will show exactly where there is consensus and where there probably won't be any consensus. The Chair stated the Subcommittee's work can carry over to the next season. Judge Korsmo stated that he is not aware of the WAPA counter proposals or the Subcommittee's work. Ms. Summers will send to Judge Korsmo WAPA's counter proposals and stated their Subcommittee meets the third Thursday of every month.

The meeting adjourned at 10:46 a.m.