



WSBA

COURT RULES AND PROCEDURES COMMITTEE

Meeting Minutes August 30, 2010

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

Members present: John Brangwin, Roy Brewer, Steven R. Buzzard, Mario Cava, Thomas J. Cunnane (by phone), Tony Di Tommaso, Rebecca Engrav, Hillary Evans (by phone), John Hathaway (arrived late), John Juhl, Barbara McInville (by phone), Bryan L. Page (by phone), Karl F. Sloan (by phone), David Trieweler, and Neil Wachter. Excused were Emily Brubaker, Mark Clausen, William Croft, Lise Ellner, Paul Henderson, Anthony Howard, Horace Lee, Patrick McKenna, Todd Nunn, Christopher Rao, Judge Rebecca Robertson, and Gregory Thatcher. Also attending were Roger Leishman (BOG Liaison), Judge Kevin Korsmo (by phone), Judge Blaine Gibson, Nan Sullins (AOC Liaison), Jane Morrow (Litigation Section), Don Horowitz (ATJ), Karla Krautscheid (WCCVA), Elizabeth Turner (Assistant General Counsel), and Anna Schmidt (Paralegal).

Chair's report: Chair Ken Masters thanked outgoing members. He had attended the July BOG meeting with Criminal Rules Subcommittee Chair Neil Wachter, David Trieweler, and Assistant General Counsel Turner. The Criminal Rules Subcommittee has been working diligently to address additional questions put forth by the BOG at the July meeting. In September, the Committee will take its final recommendations to the BOG.

Ms. Turner stated the BOG book's deadline is next Wednesday. The Committee will give the BOG an update on issues raised at the last meeting in July. Regarding ESI, the Chair received a letter from WSMA supporting electronic discovery rules. Mr. Horowitz (ATJ Technology Subcommittee representative) stated that they were delighted that the medical society will be involved.

Minutes: The minutes were approved by consensus with a few corrections.

Subcommittee Reports:

ESI Subcommittee: Chair Todd Nunn was not present at the meeting. ATJ Technology Subcommittee representative Don Horowitz reported that they reviewed Chair Todd Nunn's draft of CR 34 and think it would be helpful if Mr. Nunn and Mr. Horowitz sit down and together work out their points of disagreement. Mr. Horowitz believes they

can work out their differences on a one on one basis and then take what they've accomplished back to their respective groups.

Regarding CR 26, Mr. Horowitz reports they haven't done much work on this rule. They hope to have a report by the next meeting.

Criminal Rules Subcommittee: Mr. Wachter reported on CrRLJ 6.13, a rule modification proposal that comes to them by way of the Department of Licensing (DOL). The DOL consulted with the Attorney General's office, and the AG supports the proposed rule change. This rule modification came to the Committee directly from the Supreme Court, who requests that the Committee comment on the proposed rule on an expedited basis. This proposed rule change has to do with a case dealing with the confrontation clause: a requirement which allows the defendant to confront the person who did the actual lab testing. This requirement may have a bearing on the admissibility of records drivers' license records that the DOL maintains. The proposal is that if the defendant doesn't give notice within 7 days to the DOL to produce a custodian of records, then those records are deemed admissible without having to have live testimony. The DOL has been inundated with requests for their personnel to attend court hearings. Mr. Wachter requested his subcommittee members to check with colleagues that practice in this area of the law regarding this rule amendment. There is consensus that this rule change may not make much difference at all as it would simply add one more requirement to a list of discovery requirements that already exists. Mr. Juhl pointed out that the subtitle, "Exclusion of Test Reports," is incorrect. It is a remnant of a requirement regarding electronic speed devices. Mr. Wachter suggests we change the subtitle to "Exclusion of Certified Records." Ms. Turner made the friendly amendment to change the subtitle to "Exclusion of Certified Reports." Mr. Wachter accepted this friendly amendment.

The Subcommittee's Motion is to prepare a comment for the BOG's approval that points out the subtitle typo, and states that otherwise the Committee has no further comments on this rule. This motion was adopted by consensus.

Subcommittee X: Ms. Engrav reported they had received some comments on the MAR's during the BOG meeting:

- The BOG was concerned regarding the multiple trigger section of MAR 7.1, which they thought seemed too complicated. The BOG also questioned whether the Committee was greatly expanding the availability of a trial de novo. The Subcommittee doesn't feel as if they were greatly expanding trial de novo availability and suggests keeping the same triggers, but stating them differently. Ms. Engrav's memo broke down the triggers into three concepts:
 - 1) Issuance of the award.
 - 2) The decision to award or deny fees (triggers 2 and 3).
 - 3) filing of the arbitrator's proof of service (triggers 4 and 5).

Subcommittee X suggests combining the second and third triggers into "the decisions on costs." The "proof of service" trigger exists under case law and while it could be

omitted from the rule, the whole point of making changes to the language is to make the requirements as clear as possible. Subcommittee X suggests putting the proof of service language in the rule, but at the beginning of the rule instead of making it a numbered trigger. Judge Gibson pointed out that there might be an issue if the proof of service is filed before the award; however, this is something that would rarely occur.

The Subcommittee's motion is to accept the amendments as they appear on page 312. Discussion ensued: Ms. Turner suggested amending the language on line 5, (stating "within 20 days after the filing of proof of service of the later of...") to read "within 20 days after the arbitrator files proof of service of the later of . . .". This suggestion was accepted as a friendly amendment. Ms. Turner also suggested adding on line 6 "a timely request for", so that the line would now read "(2) a decision on a timely request for costs or attorney fees," in response to concerns brought up by the BOG at the last meeting. Judge Gibson noted the term "timely" actually appears twice already. Putting it in there one more time won't hurt, but Judge Gibson questions whether there is any way to enforce that the request be timely. Mr. Masters asked if it would help to make a point to the arbitrator. Judge Gibson doesn't think it's necessary to put it in twice, but doesn't object to it either. Mr. Leishman asked what would happen if the arbitrator doesn't file a proof of service. Judge Gibson explained that if someone doesn't file proof of service, yet a party files request for trial de novo, then the 20-day period would begin again once the proof of service has been filed.

Mr. Di Tommaso questioned why we have "a copy of" the proof of service, since we normally file the original and suggested striking it. Ms. Engrav agreed to both Ms. Turner's friendly amendments on lines 5 and line 6 and Mr. Di Tommaso's friendly amendment.

The Subcommittee's motion is the rule amendment as it appears on page 312, with line 5 changed to "within 20 days after the arbitrator files proof of service..." line 6 changed to "a timely request of..." and line 16 changed to strike "a copy of."

The motion passed unanimously.

Ms. Engrav orally recapped the BOG's other concerns:

1. One question was whether MAR 6.3, regarding the procedure for getting an award. There was a suggestion of adding "timely." The Subcommittee felt the requirement that the filing be timely was already there.
2. The BOG suggested that the arbitrator file a proof of completion; the subcommittee felt this requirement would be too difficult and it is enough just getting the arbitrator to file a decision.

The meeting adjourned at 10:22am.