



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 it. 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 Trieweiler 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, to add a 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 of the bar to amend Washington's expert rules in order to conform them to recent changes to the federal rules. These changes in the federal rules were fairly significant (for example, draft reports by experts are now protected from discovery), and the proposal is to make the same amendment to the state rules. The subcommittee was split on whether in principal these changes are a good idea, but agreed that since the federal rule change had only recently gone into effect it would be better to wait at least a year and see if there are some cases that result from it before considering any change to the state rules. Due to lack of a quorum, no vote was taken on the subcommittee's recommendation.

"Days Are Days" proposal: Ms. Engrav stated that Subcommittee X is working on another proposal that also comes from revisions to the federal rules. 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 large work effort as the subcommittee 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 intends to work on preparing the proposal this year, but anticipates that any actual votes will be taken next year.

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 addresses 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 the 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 do not know an adoption is occurring. They are seeing a possible trend where there is a pending appeal of the termination and an adoption occurs. 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 stays 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 Rule 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 is 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 any 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.