SUPPLEMENTAL MEETING MATERIALS

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Court Rules and Procedures Committee Meeting

MEMORANDUM

TO: Court Rules and Procedures Committee
FROM: Mario M. Cava
DATE: March 21, 2011
RE: Evidence Rules Subcommittee Report

The Evidence Rules Subcommittee convened by teleconference today (March 16, 2011 at 3:30 p.m.) to address proposed changes to ER 501 (Journalist Privilege). The following people were present for the meeting: Mario Cava, Eric Stahl, Paul Crisali, Shannon Ragonesi, Karl Sloan. Aaron Rocke and Ann Summers were unavailable due to scheduling conflicts. Mr. Rocke, David Bufalini and Ann Summers participated in a vote by email. Ms. Summers had previously submitted her thoughts on ER 501, which were conveyed to the Subcommittee over the phone. The following members were absent from the teleconference and did not submit votes by email: Gregory Thatcher, Kevin Korsmo, David Trieweiler

I. ISSUES PRESENTED

During the meeting, there was general agreement that ER 501 should refer to RCW 5.68.010; however, the central question was whether to include citations to two cases presently referenced in the rule: Senear v. Daily Journal American, 97 Wn.2d 148, 641 P.2d 1180 (1982); State v. Rinaldo, 102 Wn.2d 749, 689 P.2d 392 (1984). Mr. Stahl had earlier submitted a proposal to include the statutory reference in addition to the citation to case law. Mr. Crisali presented an alternative rule that included a citation to the statute without a reference to the cases.

II. RELEVANT STATUTE

RCW 5.68.010 provides as follows:

(1) Except as provided in subsection (2) of this section, no judicial, legislative, administrative, or other body with the power to issue a subpoena or other compulsory process may compel the news media to testify, produce, or otherwise disclose:

(a) The identity of a source of any news or information or any information that would tend to identify the source where such source has a reasonable expectation of confidentiality; or

(b) Any news or information obtained or prepared by the news media in its capacity in gathering, receiving, or processing news or information for potential communication to the public, including, but not limited to, any notes, outtakes, photographs, video or sound tapes, film, or other data of whatever sort in any medium now known or hereafter devised. This does not include physical evidence of a crime.

(2) A court may compel disclosure of the news or information described in subsection (1)(b) of this section if the court finds that the party seeking such news or information established by clear and convincing evidence:

(a)(i) In a criminal investigation or prosecution, based on information other than that information being sought, that there are reasonable grounds to believe that a crime has occurred; or

(ii) In a civil action or proceeding, based on information other than that information being sought, that there is a prima facie cause of action; and

(b) In all matters, whether criminal or civil, that:

(i) The news or information is highly material and relevant;

(ii) The news or information is critical or necessary to the maintenance of a party's claim, defense, or proof of an issue material thereto;

(iii) The party seeking such news or information has exhausted all reasonable and available means to obtain it from alternative sources; and

(iv) There is a compelling public interest in the disclosure. A court may consider whether or not the news or information was obtained from a confidential source in evaluating the public interest in disclosure.

(3) The protection from compelled disclosure contained in subsection (1) of this section also applies to any subpoena issued to, or other compulsory process against, a nonnews media party where such subpoena or process seeks records, information, or other communications relating to business transactions between such nonnews media party and the news media for the purpose of discovering the identity of a source or obtaining news or information described in subsection (1) of this section. Whenever a subpoena is issued to, or other compulsory process is initiated against, a nonnews media party where such subpoena or process seeks information or communications on business transactions with the news media, the affected news media shall be given reasonable and timely notice of the subpoena or compulsory process before it is executed or initiated, as the case may be, and an opportunity to be heard. In the event that the subpoena to, or other compulsory process against, the nonnews media party is in connection with a criminal investigation in which the news media is the express target, and advance notice as provided in this section would pose a clear and substantial threat to the integrity of the investigation, the governmental authority shall so certify to such a threat in court and notification of the subpoena or compulsory process shall be given to the affected news media as soon thereafter as it is determined that such notification will no longer pose a clear and substantial threat to the integrity of the investigation.

(4) Publication or dissemination by the news media of news or information described in subsection (1) of this section, or a portion thereof, shall not constitute a waiver of the protection from compelled disclosure that is contained in subsection (1) of this section. In the event that the fact of publication of news or information must be proved in any proceeding, that fact and the contents of the publication may be established by judicial notice.

(5) The term "news media" means:

(a) Any newspaper, magazine or other periodical, book publisher, news agency, wire service, radio or television station or network, cable or satellite station or network, or audio or audiovisual production company, or any entity that is in the regular business of news gathering and disseminating news or information to the public by any means, including, but not limited to, print, broadcast, photographic, mechanical, internet, or electronic distribution;

(b) Any person who is or has been an employee, agent, or independent contractor of any entity listed in (a) of this subsection, who is or has been engaged in bona fide news gathering for such entity, and who obtained or prepared the news or information that is sought while serving in that capacity; or

(c) Any parent, subsidiary, or affiliate of the entities listed in (a) or (b) of this subsection to the extent that the subpoena or other compulsory process seeks news or information described in subsection (1) of this section.

(6) In all matters adjudicated pursuant to this section, a court of competent jurisdiction may exercise its inherent powers to conduct all appropriate proceedings required in order to make necessary findings of fact and enter conclusions of law. [2007 c 196 § 1.]

III. DISCUSSION

The following issues were discussed during the subcommittee meeting:

Ms. Summers's expressed concern over email that both the statute and the cases should be cited in the rule because there are presently are no annotations to the new statute, and an unwitting researcher would not necessarily find the two cases cited in ER 501. Failure to reference these cases could present a trap for researchers not well versed in media law. Ms. Summers agreed with Mr. Stahl that, while the statute and the common law privilege appear to be largely consistent, there might be facts that arise in which different formulations would arguably lead to different results, and which would control is a decision that would need to be decided by the state Supreme Court. For that reason, she felt it best to cite the cases and the statute so that practitioners and courts would realize that both formulations remain relevant. She also noted that a Westlaw search would return no results as there are no annotations currently citing the cases.

Mr. Sloan felt it would be appropriate for ER 501 to refer only to RCW 5.68.010. Prior to the meeting, in an email, Mr. Sloan communicated that the citations should be consistent within the rule. Additionally, to permit disclosure, a court must find that the required factors set out in the statute are satisfied. This would appear to limit consideration of the earlier cases - as either the factors are met, giving the court discretion to order disclosure; or they have not been met, and the court is prohibited from compelling disclosure. The constitutional basis for the non-disclosure privilege also seems questionable. In Senear, the court stated: "*The courts which have considered the issue have unanimously concluded that the First Amendment affords a reporter no absolute privilege of nondisclosure of confidential news sources in either a criminal or civil action*. See, e.g., Herbert v. Lando, 441 U.S. 153, 99 S.Ct. 1635, 60 L.Ed.2d 115 (1979)."

Mr. Stahl had previously submitted points regarding this issue via email. He had indicated that he would support Mr. Crisali's "alternate proposal" to replace the Rinaldo and Senear citations in ER 501(f) with a citation to RCW 5.68.010. Mr. Stahl had previously suggested that it might make sense to keep the case cites along with the statute, but he explained that the important thing is that the rule should reference RCW 5.68.010, because the statute is the most current and complete articulation of the journalist's privilege. He agreed that uniformity of the rule would be a reasonable rationale for including only the statutory cite in ER 501(f). He expressed that he did not feel that the Committee needed to go any further to make the proposed change, and he would urge it not to make any formal commentary regarding the relationship between RCW 5.68.010 and the privilege recognized in Rinaldo and Senear. He expressed that those cases clearly are of diminished practical importance in light of the shield statute, but he indicated that it may not be correct to say that they are abrogated by the statute.

After the meeting, Mr. Stahl expressed by email that the journalist privilege recognized in Rinaldo and Senear rest the qualified journalist's privilege on common law rather than constitutional grounds, but it is not correct to say that the privilege lacks a constitutional basis. Rather, the Washington Supreme Court elected to rest on common law grounds rather than reach the constitutional privilege question. It certainly has not rejected a constitutional basis for the qualified privilege. This history might distinguish it from the spousal privilege and the other privileges listed in ER 501 (privileges rooted only in the common law).

Mr. Stahl further explained by email that the qualified privilege is established in other courts. "[A]ll but one of the federal circuits to address the issue have interpreted Branzburg v. Hayes, 408 U.S. 665 (1972), as establishing a qualified privilege for journalists against compelled disclosure of information gathered in the course of their work. Rooted in the First Amendment, the privilege is recognition that society's interest in protecting the integrity of the newsgathering process, and in ensuring the free flow of information to the public, is an interest of sufficient societal importance to justify some incidental sacrifice of sources of facts needed in the administration of justice." Shoen v. Shoen, 48 F.3d 412 (9th Cir. 1995)(internal citations omitted).

Mr. Stahl did not feel that the committee needed to address this to make the proposed revision, and explained that any distinctions between RCW 5.68.010 and the common law could be addressed in a specific case by the courts.

Mr. Stahl explained that, within the community of media lawyers, attorneys are familiar with the two cited cases. However, there would not be general knowledge of the cases outside of that community. He expressed that the statute is more specific in terms of the test that is applied than the cases, and a person is generally in a better position if they fall within the ambit of the statute. Mr. Stahl had previously expressed concern that the statutory definition of news media may not necessarily encompass different types of media that are available. One concern might be the blogger who does not fall within traditional definitions of news media. Mr. Stahl clarified that, while there is case law on the topic of whether, for example, a student journalist could be considered covered by the common law definition of "news media," it does not appear that the two cases presently cited in ER 501 address the definition of news media.

One issue that was raised by Mr. Cava during the meeting was whether there is a need to refer to the two cases. If the statute is more specific than the presently cited cases with regard to the applicable test, and if the two cases do not actually discuss the definition of "news media" which is defined in the statute, it does not appear that the membership benefits from reference to the statutes. Additionally, I expressed concern regarding whether the statute would eventually be annotated, creating plausible situation where the citations become outdated.

Mr. Crisali reiterated his position that the other privileges in ER 501 only cite to statutes, and this change will make the journalist privilege consistent with other privileges referenced in ER 501. Mr. Crisali has also expressed that "citing the cases is unnecessary because RCW 5.68.010 appears to codify common law. Tegland (Section 501.101) supports that theory, and he notes that to the extent there is a conflict, RCW 5.68.010 probably controls. If anything, RCW 5.68.010 sets forth a clearer test than the common law. Under common law, newspapers and their reporters have a qualified privilege of nondisclosure of confidences and confidential news sources. Senear v. Daily Journal-American, 97 Wn.2d 148, 155-56, 641 P.2d 1180 (1982); State v. Rinaldo, 102 Wn.2d 749, 755, 689 P.2d 392 (1984). The privilege exists unless: (1) the claim is meritorious,*i.e.,* it must not be frivolous or brought for the purpose of harassing the reporter; (2) the information is material to the cause of action, defense, etc.; (3) a reasonable effort is made to acquire the desired information by other means; and (4) the interest of the reporter in nondisclosure is supported by a need to preserve confidentiality. Id. RCW 5.68.010(5) defines "news media." Mr. Crisali researched to some extent the statutory abrogation of privilege rules. In State v. Thornton, 119 Wn.2d 578, 835 P.2d 216 (1992), the Court addressed a statutory change to the spousal privilege (ER 501(f); RCW 5.60.060(1)). The Court noted that the spousal privilege had its origins in common law and held that it was altering common law to treat the privilege the same as the statute. Id. at 581, 583. It appears that ER 501(f) only cites to RCW 5.60.060(1) and two other statutes, but not case law. Mr. Crisali further pointed out that the case law on attorney client privilege explains how the privilege is both a creature of statute and common law. That case law is not cited behind the attorney-client privilege within ER 501.

Mr. Crisali opined via email before the meeting that , in Senear v. Daily Journal-American, 97 Wn.2d 148, 641 P.2d 1180 (1982), the Court derived the privilege from the common law and not from the First Amendment. For instance, the Court notes that while some courts have looked to the First Amendment, it was resorting to common law principles. Id. at 151-53. Further, in Justice Utter's concurrence, he explains that he concurs in the result only because the majority does not use the First Amendment and is thus subject to the whims of the Legislature. Id. at 157. In Rinaldo, the Court rejected the Court of Appeals' argument that an absolute privilege derived from Art. I, § 5 of the Washington Constitution. 102 Wn.2d at 753 Again noting that other states use the First Amendment to find a qualified journalist privilege, the Court ultimately determined that the source of a journalist privilege in criminal cases is found in common law. Id. at 754-55. This time, Justice Utter concurred, arguing that the Court did not need to limit Art. I, § 5.

While Mr. Crisali shared some of Ms. Summer's concern that courts might treat facts differently under the common law approach versus the statutory approach, he wondered if that might occur at a very nuanced level. For instance, ER 501(a) cites only to RCW 5.60.060(2), which provides that an attorney cannot be examined as to communications made by the client. Neither ER 501(a) nor RCW 5.60.060(2) cites to the common law exceptions or that the privilege can extend to investigators, etc. See*,* e.g.*,* Soter v. Cowles Publishing Co., 162 Wn.2d 716, 174 P.3d 60 (2007); Pappas v. Holloway, 114 Wn.2d 198, 203-204, 787 P.2d 30 (1990) (noting that the attorney-client privilege extends exists both statutorily and under common law). ER 501(a) simply provides that initial starting point. I have not done the research, but I would imagine similar instances exist with the spousal privilege.

During the meeting, Ms. Ragonesi stated that she supports referring to just the statute to ensure that the rule is consistent. If there is going to be a reference to cases with respect to one

subsection, then there might be undue emphasis placed upon those particular cases. There is case law to support each of the privileges identified in ER 501, and those cases would also need to be referenced to make the rule consistent. It would be logical to say that the cases were originally cited when there was no statute governing the journalist privilege before. Now that there is a statute, there is no need to include the two cases referenced in the rule.

IV. CONCLUSION

By a vote of 6 to 1 with 3 abstaining, the Evidence Rules Subcommittee voted to propose ER 501(h) with a reference to RCW 5.68.010 only and submit the matter for a vote by the Committee at large.

The votes are as follows:

1. Mario Cava (Statute Only)
2. Paul Crisali (Statute Only)
3. Shannon Ragonesi(Statute Only)
4. Karl Sloan (Statute Only)
5. Ann Summers (Statute and Citations)
6. Aaron Rocke (Statute Only)
7. David Bufalini (Statute Only)

SUGGESTED AMENDMENT

RULES OF EVIDENCE (ER)

Rule ER 501
General Rule

The following citations are to certain statutes and case law that make reference to privileges or privileged communications. This list is not intended to create any privilege, nor to abrogate any privilege by implication or omission.

(a) Attorney-Client. (Reserved. See RCW 5.60.060(2).)

(b) Clergyman or Priest. (Reserved. See RCW 5.60.060(3), 26.44.060, 70.124.060.)

(c) Dispute Resolution Center. (Reserved. See RCW 7.75.050.)

(d) Counselor. (Reserved. See RCW 18.19.180.)

(e) Higher Education Procedures. (Reserved. See RCW 28B.19.120(4).)

(f) Husband-Wife. (Reserved. See RCW 5.60.060(1), 26.20.071, 26.21.355(8).)

(g) Interpreter in Legal Proceeding. (Reserved. See RCW 2.42.160; GR 11.1(e).)

(h) Journalist. (Reserved. See ~~Senear v. Daily Journal-American, 97 Wn.2d 148, 641 P.2d 1180 (1982); State v. Rinaldo, 102 Wn.2d 749, 689 P.2d 392 (1984)~~ RCW 5.68.010.)

(i) Optometrist-Patient. (Reserved. See RCW 18.53.200, 26.44.060.)

(j) Physician-Patient. (Reserved. See RCW 5.60.060(4), 26.26.120, 26.44.060, 51.04.050, 69.41.020, 69.50.403, 70.124.060, 71.05.250.)

(k) Psychologist-Client. (Reserved. See RCW 18.83.110, 26.44.060, 70.124.060.)

(l) Public Assistance Recipient. (Reserved. See RCW 74.04.060.)

(m) Public Officer. (Reserved. See RCW 5.60.060(5).)

(n) Registered Nurse. (Reserved. See RCW 5.62.010, 5.62.020, 5.62.030.)

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