



# WSBA

## COURT RULES AND PROCEDURES COMMITTEE

### Meeting Minutes October 17, 2011

Chair Ken Masters called the meeting to order at 9:33 am.

Members present: Peter Banks, Daniel Brown (by phone), Steven Buzzard, Mario Cava, Paul Crisalli, Anthony DiTommaso, Jr., Rebecca Engrav, Hillary Evans, Beth Fraser, Justo Gonzalez, Dale Johnson, Shannon Kilpatrick, Nicole McGrath, Kathleen Nelson, Bryan Page, Shannon Ragonesi, Aaron Rocke, Karl Sloan (by phone), Derek Smith, and Ann Summers. Also attending were Hon. Kevin Korsmo (Court of Appeals liaison, by phone), Hon. Blaine Gibson (Superior Court liaison), Hon. Rebecca Robertson (DMCJA liaison), Nan Sullins (AOC liaison), Marc Silverman (BOG Liaison, by phone), Pat Char (Real Property Trust Section), Karl Tegland, Mike Runyan (WDTL), Elizabeth Turner (Assistant General Counsel), and Darlene Neumann (Paralegal).

#### Welcome/Introductions:

The Chair greeted the Committee and asked each member to introduce him or herself.

The Chair pointed out the meeting dates in the Welcome Packet and explained that materials are distributed electronically. The Chair explained the rulemaking process to the Committee [see Protocol & Procedures inside the Welcome Packet], which includes subcommittees vetting and scrubbing proposed amendments to the rules, followed by the larger Committee making a recommendation to the Board of Governors. The proposed amendments are sent to the Committee by lawyers, judges, and others. The proposals the Committee and subcommittees are working on are also sent out to interested parties and stakeholder groups. This year's cycle includes the Civil Rules (CR), Civil Rules for Courts of Limited Jurisdiction (CRLJ), and the Mandatory Arbitration Rules (MMAR). The cycle is a 4-year cycle.

The Chair explained that the majority of the work is done in Subcommittee and attendance at those meetings is crucial. He discussed the Committee's timeline and deadlines in order for the BOG to get materials to the Supreme Court by their annual deadline. All meetings are open to the public and run according to Robert's Rules of Order.

In response to a question regarding whether schedules of subcommittee meetings are available, the Chair explained that subcommittees often meet on an "as needed" basis

and that interested parties are notified of subcommittee meetings in advance. The Chair explained the role of the subcommittee chairs, which includes bringing the subcommittee's recommendations to the full committee and soliciting comments regarding proposals, creating discussion, and reporting back to the larger committee on the general feel of the proposal. The subcommittee chair brings a motion to the larger Committee, and the Committee makes recommendations to the BOG. The BOG determines what proposals are sent to the Supreme Court, and the Supreme Court ultimately decides which rules get published for comment and adopted. The Committee is an important consultant regarding the rule-making proposal to the Supreme Court.

The Chair explained the process of GR 9 [see Welcome Packet] and advised members of the importance of stability within the rules. A fundamental assumption of this Committee is that a current rule shouldn't be changed if a problem doesn't actually exist.

#### Old Business:

The Chair reported on last season's recommendations.

- *RAP 18.13A*: The Chair explained the proposed amendment by OPD to RAP 18.13A, regarding accelerated review of juvenile dependency disposition orders and orders terminating parental rights. The Committee's response was to suggest alternate amendments, which were approved by the Board of Governors and sent to the Supreme Court. The proposal from the WSBA will be published for comment by the Supreme Court, with the comment period ending April 30, 2012.
- *ER 501*: The Committee's proposed amendment to ER 501 changing case law cites on journalist privilege to cite to statute, and updating spousal privilege to new statute which incorporates domestic partners into the privilege) was also approved by the BOG and sent to the Supreme Court, which has ordered it for publication with a comment period ending April 30, 2012.
- *CrR 4.11*: The proposed Witness Recording rule, published for comment by the Supreme Court, has garnered more than a hundred comments. Despite the BOG's recommendation, the Supreme Court rejected the new rule. It was a very controversial proposal.
- *SCJA's proposed CrR 3.1(g)*: The Board of Governors agreed with the Committee's recommended response to the SCJA's proposed amendment to CrR 3.1(g), which was to oppose the adoption of the amendment. The Chair noted that at the BOG meeting the SCJA representative stated that the SCJA actually agreed with the WSBA's position.

*Minutes*: The June 2011 minutes were approved by consensus.

*ER Subcommittee:* Mario Cava, the ER Subcommittee chair and now the chair of Subcommittee X, explained that two suggested rule changes were carryover from last year. Mr. Karl Tegland spoke to recommended amendments to ER 804, Forfeiture by Wrongdoing, and ER 901, Authentication of Emails.

*ER 804(b)(6):* Proposed changes to ER 804, incorporating changes made to the Federal Rules of Evidence into the Washington State Rules of Evidence, were sent in an earlier term to Subcommittee X. Subcommittee X received feedback from both prosecutors and defenders, then voted to take no action. Last term, the ER Subcommittee voted to revisit the rule, sought additional feedback, and did more research by surveying other state's rules. Some states adopted the federal rules and some states only adopted the rule, but omitted certain parts of it. Ann Summers proposed to the Subcommittee to adopt the New Jersey version of the rule, which removes the term "acquiesce." The ER Subcommittee supported this proposal, although a number of the ER Subcommittee members were not available to attend and vote on the proposal.

Mr. Tegland discussed the application of this rule in federal court where, if a party has caused the unavailability of a witness, then they waive their right to applicability of the hearsay rule. Most states follow the federal rule. Mr. Tegland is okay with either basing our state rule on the federal rule or on New Jersey's rule, which is the subcommittee's proposal.

Ms. Summers explained that the subcommittee reviewed the different states' formulated rules and decided that New Jersey's rule was the clearest and most cleanly written. Discussion ensued regarding language, and Mr. Cava discussed comments sent in by David Trieweler. Mr. Trieweler concurred with Ms. Summers' recommendation to adopt the New Jersey rule, except he also suggests leaving out the terms "directly or indirectly" due to the difficulty in defining such terms. Mr. DiTommaso questioned whether advance written notice should be in the rule, as it is in the Ohio and Wyoming rules. Discussion ensued regarding whether using the term "indirectly" would alter the standard of proof in an evidentiary hearing [*determining whether a party's wrongdoing intended to procure the unavailability of a witness*]. Judge Robertson responded to Mr. DiTommaso that requiring notice rarely happens, because such an evidentiary hearing is always subject to a pre-trial motion, and that the proponent in such an evidentiary hearing is always subject to a high standard of proof. Discussion ensued regarding the term "unavailability" and whether there would be other reasons a witness may be unavailable outside of death. Discussion ensued regarding the standard of proof required in *State v. Mason*, 160 Wn.2d 910 (2007), which was "clear and convincing," versus that in *Giles v. California*, 128 S. Ct. 2678 (2008), which was the lower "preponderance of the evidence" standard.

The Subcommittee's motion to adopt the New Jersey Language for Washington's ER 804(b)(6) [see p. 32 of the materials] passed with 19-0-1 (Rebecca Engrav abstained).

*ER 901*: This proposed amendment would add an illustration of the appropriate way to authenticate emails. Courts are divided on whether more stringent requirements should be applied to the authentication of emails and text messages.

Mr. Tegland also supports the subcommittee's proposal regarding ER 901, as written on page 51, Authentication of emails, which would involve a statement or guidelines or an illustration informing readers how emails can be authenticated, without any stringent requirements. Discussion ensued regarding the fact that ER 901 would not be binding or mandatory.

Discussion ensued regarding the language in the proposed rule. Mr. Silverman voiced concern that the rule may be obsolete in the near future because of the advancing state of technology. Ms. Engrav made a friendly amendment to add "the" before "sender's agent" on the fifth line down and to add a comma after "circumstances" on the eighth line down. Another friendly amendment was made to add a "the" before "circumstances" on the eighth line down. Discussion ensued regarding the proper spelling and use of the term "email." The motion to adopt the rule, as written on page 51 of the materials, with the three friendly amendments, passed unanimously.

The Chair made the following closing comments:

- Recommended everyone to bring their Court Rules books to the meetings, which usually only last three hours or less. If a meeting will be longer, members will be warned in advance.
- Reminded those who are members to complete and turn in their expense reports.
- During meetings, speakers need to speak loudly so that everyone can hear their comments.
- Subcommittee assignments were sent out. Talk to Elizabeth Turner, Staff Liaison, if you want to change subcommittees or work with more than one. Anyone can volunteer to work on a subcommittee.

Meeting Adjourned into subcommittee discussion groups at 11:30am.