



# WSBA

## COURT RULES AND PROCEDURES COMMITTEE

### Meeting Minutes February 25, 2013

Committee Chair Hillary Evans called the meeting to order at 9:35 a.m.

Members present: Chair Hillary Evans, Gene Barton, Katharine Bond (by phone), Roy Brewer (by phone), Dean Chuang (by phone), Leslie Clark, Paul Crisalli, Tony DiTommaso, Jr., Eric W. Eisenberg (by phone), David M. Iseminger, Kailin James, Dale Johnson (by phone), Shannon Kilpatrick (by phone), Shawn Larsen-Bright, Roger A. Leishman, Kathleen Nelson (by phone), Bryan Page (by phone), Shannon Ragonesi (by phone), Ann Summers, Judge Kevin Korsmo (by phone), Judge Blaine Gibson and Judge Rebecca Robertson (by phone).

Members excused from attending: Anne M. Cruser, Maureen M. Cyr, Elizabeth A. Fraser and Nicole McGrath.

Members who did not respond to meeting notice or attend meeting: Daniel Brown, Sean J. Flynn, Jeannie Mucklestone and Karen Denise Wilson.

Non-Members/Guests present: Shane Carew (by phone), Christina Kale (ATJ Board's Technology Committee) (by phone), Trisha McArdle (Attorney General's Office), Joel Delman (AGO) and Shannon Gould (Northwest Defenders Association).

Also attending: Ken Masters (BOG Liaison), Nan Sullins (AOC Liaison), Elizabeth Turner (WSBA Assistant General Counsel – Staff Liaison) and Sherry Mehr (WSBA Paralegal).

### Minutes

The January 2013 Minutes were approved by consensus with no changes or corrections.

### Old Business

There was no old business to discuss. Ms. Turner reminded everyone that if their term is expiring this year they would have received an email about reapplying and to please fill out the application as soon as possible.

## **New Business**

*RAP Subcommittee:* Subcommittee Chair Ann Summers reported that RAP 8.1, Supersedeas Procedures, is being worked on and will be brought forth to the Committee with the subcommittee's work on the other rules. Ms. Summers discussed the PRP rules and stated the subcommittee is on schedule to have recommendations to the Committee by May.

*ESI Subcommittee:* Subcommittee Chair Sean Larsen-Bright reported that he met by telephone on President's Day with Christina Kale, Greg Hitzel and Don Horowitz of ATJ and discussed CR 33 and CR 26. Mr. Larsen-Bright explained that CR 26 has some language changes which do not mirror the Federal Court rule but the subcommittee will work with ATJ to try to reach an agreement on proposed language. Mr. Larsen-Bright expressed that there is a good working relationship with everyone and the subcommittee will submit a report to the committee with a rule proposal before year end.

*Subcommittee X:* Subcommittee Chair Gene Barton reported that the subcommittee had a telephone meeting and, after lengthy discussion, unanimously voted to not support the Northwest Defenders Association's proposed amendment to JuCR 9.3. Because this is a subcommittee recommendation, there is no need for a second.

Mr. Barton stated that the stakeholders provided materials that are not included in the meeting materials due to length and if anyone would like a copy, it will be provided. Mr. Barton explained the two principal issues the subcommittee has concerns about: (1) the issue addressed in the proposed rule change is under appeal; and (2) the issue appears to be restricted to King County only and perhaps more appropriately should be addressed at the local level rather than statewide. In addition, the subcommittee is also concerned that JuCR 9.3 does not address GR 15. Mr. Barton noted that late materials had been received from Shannon Gould of the Northwest Defenders Association and were distributed by e-mail on Friday. The late materials describe what appears to be an informal, limited survey conducted by the NDA; Mr. Barton stated that he appreciated having the information but opined that if the proposed amendment is to have further consideration by either the court or this committee that the survey would only be helpful if it were a full, state-wide survey. Mr. Barton also expressed the subcommittee's concern that if there is a need to amend the rule on a state-wide basis, it would be better to have a rule where all sides have had the opportunity to participate in the drafting process rather than a proposal submitted by, essentially, one side of the issue with no opportunity for input by the other side.

Judge Gibson opined that the existing rule applies to juvenile offender cases only and that while the proposed amendment came from the criminal defendant's side, trying to make one rule applicable to civil, non criminal and dependency trials will be an issue because these cases do not have the same right to counsel as in criminal proceedings. Judge Gibson felt it would be more appropriate to have the court make a finding if a party has the constitutional and the statutory right to counsel and/or expert before the process described in the proposed rule

amendment would take place, and that if the thought behind the proposed amendment was that this was what would happen, the rule needs to say that.

Mr. Eisenberg inquired whether, if public funding is involved, would someone making a records request be entitled to sealed motions, and under what circumstances does the opposing party or public have the right to know where the funding and the reports are coming from. Mr. Eisenberg expressed that there are larger policies in play that need to be considered.

Ms. Gould explained that the defense cannot disclose work product and the fact that they are requesting funds for experts is pretty much all the defense can disclose. Ms. Gould agreed it would make sense to change the name of the proposed rule so it reflects that it would only apply when there is a Constitutional or statutory right to counsel. Ms. Gould stated that the Attorney General's office has their own experts or counsel but Northwest Defenders do not, and it is Northwest Defenders Association's position that the same standard should be applied to juvenile court as is applied for criminal court.

Mr. Masters expressed that if the Northwest Defenders plan to modify the JuCR 9.3 proposed amendment that they inform this Committee and the Board of Governors that there are changes to the proposal. Mr. Masters inquired whether the AG could respond to the issues raised by Ms. Gould.

Ms. McArdle explained that the larger counties do not use this kind of procedure, except for King County, and deal with expert services funding internally rather than by motions. It is the AG's position that the motions practice sets King County apart from other counties and does run afoul of GR 15. The cases that are on appeal involve discovery issues that are ignored or are not being fully attended to. Ms. McArdle stated that the proposed rule does not correct or direct the discovery issue, and opined that if public funding is requested for expert services, then it should be administered through the county rather than involve the court and motions practice. Mr. Delman expressed that the AG's office and DSHS are not interested in finding out defense strategies or invading attorney-client privilege, and are not asking for justification for, or identification of, the expert; rather, they just need to hear that the parties need the funding for expert services.

Mr. Leishman opined that the main reason this committee is hesitant is because of the pending cases on appeal. It is not helpful for this committee or the court when we do not have all of the information before working on a proposed rule change, and we would like to see how the court decides on this issue. Mr. Crisalli stated that the juvenile court rules specifically state that to the extent the juvenile rules don't apply the CRs do, and it would be most appropriate to wait to see how the appellate court decides the issue before considering any proposed rule change.

The committee further discussed the issues raised by public funding and court orders. Ms. McArdle expressed that the AG's office feels it is an unnecessary rule because if funding is necessary, then the defendant may administratively request additional funding, and it is not necessary for the court to be involved.

Mr. Leishman opined that if the defendant has constitutional right for funding, then a court order is needed.

Ms. Summers inquired how the funding is distributed. Ms. Gould explained that the Washington State Office of Public Defense offers a program called the Parent Representation Program. Counties participating in the program have the funds for expert services distributed by administrators. When funds are requested for expert services, the Attorney General's office is not notified and the requesting party is not required to disclose the trial strategy or work product to the AG's office. King County does not participate in this program, so they have their own procedure.

Judge Gibson explained that a judge does have a role in the administrative forum in the sense that if an administrator declines a request the party can and should seek judicial review. He suggested that perhaps the proposed rule amendment could be narrowed in scope (such as, for example, to apply only to terminations), which could perhaps be agreed to, and the remaining issues/case types could be dealt with later. He also suggested that the rule require the requesting party to include discovery deadlines and discovery status in their request, and that perhaps Northwest Defenders should look to the new sexually violent predator statute (which limits parties to one expert) as guidance.

Mr. Barton expressed that having been on this committee for six years, this rule is inappropriately on a fast track and opined that, in order for JuCR 9.3 to be recommended, this committee needs the time to review it and take the rule through the normal vetting and scrubbing process.

After discussion, the committee unanimously voted to recommend that the Board of Governors not support the proposed amendments to JuCR 9.3. After the vote, Shannon Gould, Trisha McArdle, and Joel Delman left the meeting.

*Suggested UCLA Rules:* The Chair reported that a Work Group, comprised of WSBA employees Jean McElroy, Doug Ende, Kathryn Leathers, and various stakeholders, had developed the UCLA Rules that were referred to this Committee by the Board of Governors. Both the Act and the proposed rules were drafted by the Uniform Law Commission, and were modified by the Work Group to make them Washington specific. After the BOG referred the draft rules to this Committee for expedited review, the Chair formed an ad-hoc subcommittee, which met twice with the Work Group and known stakeholders. The subcommittee has a few suggested changes to the UCLA rules that were agreed to by everyone who participated in the meetings. The Chair explained that a strong contingent of attorneys really want this legislation and the Rules to be enacted and similar rules are in existence in approximately a dozen other states. The Chair also noted that the subcommittee reached out to ATJ and asked if they had any concerns but ATJ is taking the position that they do not have any particular ATJ issues with this rule because the rule only applies to people with attorneys, as opposed to pro se parties.

The ad-hoc subcommittee recommends deleting the lengthy definitions section and making some slight changes to Rule 6 (as suggested to Toni DiTommaso, Jr.) The Chair opined that it is a better set of rules with the changes made by the subcommittee.

Ms. Turner explained that the UCLA rules will not come from this committee but rather are being proposed by Kathryn Leathers. Ms. Turner reported that Jean McElroy had indicated she thought the reason the original Work Group thought the definitions section should be included in both the statute and the rules is that the definition of “law firm” in the UCLA act and rules differs from the definition in RPC 1.0(c). Ms. Turner spoke with Doug Ende, Chief Disciplinary Counsel, and while in an ideal world the two definitions would match, as of right now, without having any idea what the final legislation will say or how the Act will work, it is preferable to have the definitions only in the statute; the rules can always be amended later if need be. Ms. Turner stated that the committee will be voting whether to recommend the revised UCLA rules to the BOG and should suggest that if the Legislature passes the bill, the committee would like to have the opportunity to review the rules one more time to make sure the rules accurately reflect the legislation as passed.

It was moved and seconded to recommend to the Board of Governors that if the legislation goes forward and if the BOG thinks a new set of rules needs to be adopted to go with that legislation that the BOG recommend adopting our Revised Rules, with the suggestion that the Committee be allowed to revisit the Rules to make the Rules consistent with any amendments to the Act.

There was further discussion. Ms. Turner explained that Representative Pedersen is one of the sponsors for this bill and there is a very good chance that this bill may be adopted by the Legislature, so there is a perceived need for us to have proposed rules at the ready.

Ms. Turner reiterated that the committee will propose the UCLA rules with the suggested amendments and if the pending legislation passes, we request the opportunity to revisit the proposed rules. She also stated that the presentation to the BOG will focus on the value of uniformity and that we recognize the hard work and compromise that resulted in the original Rules and the Revised Rules.

After further discussion, the committee voted unanimously to approve the submission of the Revised UCLA rules to the BOG, on the conditions set forth above.

Ms. Turner informed the committee that the Chair and she will be attending the BOG meeting in Vancouver, Washington on March 8; committee members are welcome to participate by phone if they like.

Ms. Turner expressed her gratitude to all the Committee and subcommittee members for all their hard work.

Mr. Masters thanked everyone on behalf of the BOG and expressed that none of this could have happened without the help of this Committee.

The meeting adjourned at 11:15 a.m.