



WSBA

COURT RULES AND PROCEDURES COMMITTEE

Meeting Minutes

April 19, 2010

Ken Masters called the meeting to order at 9:34 am.

Members present: John Brangwin, Judge Steven R. Buzzard, Mario Cava, Mark Clausen (by phone), Anthony Di Tommaso, Jr., Rebecca Engrav, Hillary Evans, Paul Henderson (by phone), Horace Lee (by phone), Todd Nunn (by phone), Bryan L. Page (by phone), Rebecca Robertson, Gregory Thatcher, David Trieweiler, Neil Wachter, and Judge Blaine Gibson. Also attending were Roger Leishman (BOG Liaison), Don Horowitz (ATJ), Nikole Hecklinger (SCRAP), Stephen Hobbs (King County Prosecutors Office), Brian Rowe (ATJ), Elizabeth Turner (WSBA Liaison), and Anna Schmidt (WSBA Paralegal). Excused were Roy Brewer, Emily Brubaker, William Croft, Thomas Cunnane, Lise Ellner, John Hathaway, Anthony Howard, John Juhl, Barbara McInville, Patrick McKenna, Christopher Rao, Karl Sloan, Judge Kevin Korsmo, and Judge Ann Harper.

Minutes:

The minutes from the March 15, 2010 meeting were approved by consensus with three changes.

Chair's report:

Mr. Masters reported that the deadline for submissions for the July BOG meeting is July 7, 2010. He opined that we have plenty of time to submit our materials thanks to our excellent subcommittee chairs.

ESI Subcommittee:

The Chair reported that the ATJ Technology Subcommittee submitted proposed revisions to CR 34 (Production of Documents) to Mr. Nunn. By the next meeting, the Committee will see the language proposed. Because ESI subcommittee chair Todd Nunn had not yet joined the meeting, Mr. Horowitz, a representative of the ATJ Technology Subcommittee, explained that by amending this rule they were trying to address issues judges raised regarding formatting, with the goal of avoiding unnecessary hearings. The ATJ Technology Subcommittee is very open to suggestions. The ATJ Technology Subcommittee is also working on amending language in CR 26 (General Provisions Regarding Discovery) to address questions from the WSBA BOG regarding changing the burden of proof. The Subcommittee is

meeting this week to determine their direction and should have a draft of the amended rule by the next Committee meeting. Mr. Horowitz reported that they expect the larger ATJ Committee to look at their proposed materials after the Court Rules & Procedures Committee's ESI Subcommittee and the Superior Court Judges have had a chance to see the materials. Having the concurrence of the judges would assist them in getting the WSBA BOG to agree to their amendments. Mr. Horowitz is not sure whether CR 26 will be ready in time for the BOG Meeting's July deadline. CR 26 will also affect CR 45 (as related to CR 45 subpoenas that request production). Mr. Rowe, who also represents the ATJ Technology Subcommittee, agreed that they're taking each rule independently, and coming up with a draft, and then passing that draft onto the ESI subcommittee. Part of their strategy is that there may be more agreement by looking at the rules independently rather than looking at the rule changes as a whole. Mr. Masters reminded the group that the BOG has not yet voted on these rules yet. Ms. Turner explained that, whatever we take to the July BOG meeting, will need to be voted on in the June Committee meeting.

Mr. Nunn joined the conference phone. He explained that Mr. Horowitz sent him a draft. His plan is to get his individual thoughts first to Mr. Horowitz before the draft goes before his Subcommittee, per Mr. Horowitz's original request.

Subcommittee X:

Chair Rebecca Engrav explained that there are no new proposals that have come before this Subcommittee; therefore, they have nothing new to report. The Chair thanked the Xers for their hard work to date.

Criminal Rules Subcommittee:

Mr. Wachter reported that there are four different rules either under consideration by the Subcommittee or which have been brought to the Subcommittee's attention, and that the Subcommittee needed direction from the Committee.

- CrR 4.8 (the Subpoena Rule) – the Subcommittee was tasked with looking at the comments by the Supreme Court. They identified four separate issues in Subcommittee, and drafted a letter responding to each issue. Their plan is to give the letter to the Committee Chair to then fashion as a letter addressed to the president of the BOG, and then the BOG can send the same letter to the Supreme Court. The motion is not for the Committee to adopt the exact language of the letter, but instead to adopt the substance of it. The four issues outlined: (1) that discovery in criminal cases is symmetrical and that this proposed change would change the symmetry; (2) that the changes would abrogate the court approval for issuance of subpoenas duces tecum; (3) that there would be an erosion of privacy standards; and (4) that defense counsel will abuse the power of subpoena. The draft letter begins by explaining that defense counsel have professional obligations that prosecutors do not, including disclosing only evidence that will be used in trial. The prosecutors, on the other hand, must disclose all

exculpatory evidence. Next, the letter explains that, under the current rules, subpoenas may be issued by the attorneys of record, and goes on to explain that the proposed rule doesn't affect the various existing rules for information that is deemed private (for example medical records); it only provides a minimum procedure in the absence of other statutory notice requirements. Finally, the letter states that attorneys in any area are capable of making mistakes, as well as committing abuse, with regard to Discovery Rules and that those who do commit abuse are the rare exception. The Subcommittee's motion is to approve the letter as a statement of the substance for Mr. Masters to pass to the BOG. Mr. Masters explained that he would work on this letter with the Executive Director, but will not change the substance of the letter. The motion was approved by consensus.

- CrR 4.11 (Interviews of Witnesses) – Mr. Wachter explained the history of the proposed rule, including the history of opposition by several groups. Recently some of those groups have shifted their stance that it's inappropriate for prosecutors to require recorded interviews. This Supreme Court has not yet sought the Committee's input regarding this new rule. The Subcommittee has tried to clean up the rule in order to make the process more clear. The Subcommittee drafted a new GR 9 cover sheet introducing what is proposed [pp 158 -159]. The rule itself is found at p. 157. The Subcommittee cleaned up some formatting errors and inconsistencies. They have received a total of three letters from victim advocates voicing their concerns regarding this proposed rule. Those groups were invited to attend this and future Committee meetings to voice their concerns. Mr. Trieweiler commented that there has been renewed interest in this new rule. He also wants to go forth to the BOG, stating victims' rights groups have been invited to the Subcommittee meetings, as well as the Committee meetings, to voice their concerns. Mr. Brangwin commented that he was a part of the subcommittee six years ago when the rule was first proposed. He doesn't understand the reaction of victim's groups, but feels it's appropriate to hear out all the comments. He personally doesn't see the harm in having an accurate recording of the statement. Ms. Engrav concurred and was surprised to see the vehemence of the letters she read. She agreed that having them in a Subcommittee meeting would be a good idea – perhaps the Subcommittee could better explain to these groups the process. Mr. Wachter agreed that this may be a starting point and that the participation of the victim's groups would be more meaningful at the next Subcommittee meeting. He proposed taking these materials back to the Subcommittee and having the victim's groups attend a Subcommittee meeting. Mr. Masters agreed.
- CrR 2.3 (Search and Seizure): This is the search warrant rule that governs criminal cases. Mr. Wachter introduced Steve Hobbes from the King County Prosecutors Office, who would like to introduce a proposed change to CrR 2.3 governing the procedures, and not the substance, of obtaining a search

warrant. Currently, there are two ways to obtain a search warrant: an officer can personally submit a search warrant to a judge or can call and do it by telephone after being sworn to tell the truth. Mr. Hobbes would like them to also have the option of email, at the judge's discretion. This option may be better than by telephone because the judge can read a written document. None of the substantive requirements would be changed. Mr. Hobbes added a provision stating that search warrants obtained in this manner are still being submitted under penalty of perjury. Officers have been coming forward asking them whether warrants can be submitted in this fashion. Mr. Wachter is looking for direction from the Committee regarding whether they'd like the Subcommittee to look over this rule and scrub it (not whether to accept this rule yet). Mr. Wachter questions how this rule would work in the middle of the night, when a judge's email is turned off. Mr. Hobbes assured him that there would still be a phone call required, but the judge would need to follow it up with an email exchange. Judge Gibson opined that this amendment is a good idea as he occasionally gets these calls in the middle of the night and on the weekend and likes that it gives judges the option of reading the search warrant themselves instead of having it read to them over the phone. Judge Robertson concurred with Judge Gibson's remarks, stating that some of the search warrants are very long and much easier to read via email. In addition, she doesn't live in her jurisdiction, thus it would be very difficult for someone to physically bring her the warrant, and having the judge be able to actually read it better protects the defendant. In answer to a question regarding the phone call, Mr. Hobbes explained that the officer can quickly call the judge to see if they're willing to receive the warrant by email. If there's any substantive question as to the content of the warrant, the conversation would probably need to be recorded. At this point, the proposal would allow the judge to electronically approve the subpoena. Mr. Brangwin brought up the fact that many officers can now electronically sign an infraction ticket. He would worry over there being two modes of electronic signature. He'd hate for there to be confusion where an officer would use the wrong system to sign the warrant, thereby invalidating the warrant. Judge Buzzard questioned how a judge would talk to the officer if he has a question and the officer is off the next morning. These questions will be discussed at the Subcommittee level. Mr. Leishman suggested the subcommittee will talk to any civil liberty groups in case this amendment alters how police treat individuals. Mr. Wachter brought a motion to send the proposed amendment to subcommittee, which passed by consensus.

- CrRLJ 7.3 (the Judgment Rule): The Supreme Court requested that the Committee weigh in on proposed changes to this rule, which was proposed by the DMCJA. The Subcommittee proposes developing a statement for possible use in a letter, similar to what they did for CrR 4.8. This amendment affects the judgment and sentencing forms at municipal courts by making them more uniform across the country. The specific request is that the judgment will cite the specific ordinance and identify whether the

offense that the defendant has committed is a domestic violence offense. Mr. Masters questioned whether anyone from the Washington's Defender Association is on the subcommittee and suggested inviting them to attend the subcommittee meeting. Judge Buzzard suggested that the DMCJA (who first proposed the amendment) also be invited to attend the Subcommittee meeting. Ms. Engrav suggested the Subcommittee think about how the process for deciding whether an offense is a domestic violence offense would be made. Mr. Wachter reminded the committee that, in many jurisdictions, it is the finder of fact who determines that an offense is a domestic violence offense. Judge Gibson was bothered by the word "charged," and explained that the charge and the conviction can be very different – that one can be charged with a domestic violence crime, but not convicted or sentenced for, that particular type of a crime. The Committee agreed by consensus to the Subcommittee's proposal.

The meeting was adjourned at 10:33 am