



WSBA

COURT RULES AND PROCEDURES COMMITTEE

Meeting Minutes

June 21, 2010

Members present: John Brangwin (phone), Roy Brewer, Steven Buzzard, Mario Cava, William Croft (phone), Rebecca Engrav, Hillary Evans, John Hathaway, Paul Henderson (phone), John Juhl (phone), Barbara McInville (phone), Todd Nunn (phone), Bryan Page (phone), David Trieweler, and Neil Wachter. Also attending were Roger Leishman (BOG Liaison), Don Horowitz (ATJ) (phone), Judge Blaine Gibson, Nan Sullins (AOC Liaison), Karla Krautscheid (phone), Ramona Brandes (NW Defenders Assn), Kent Underwood, Sherry King (Snohomish Co. Prosecutor's Office) (phone), Scott Peterson (phone), Debbie Lee (Victim's Rights Advocate), Elizabeth Turner (WSBA Liaison), Jeanne Marie Clavere (WSBA Professional Responsibility Counsel) and Darlene Neumann (WSBA Paralegal). Excused were Emily Brubaker, Mark Clausen, Anthony Di Tommaso, Jr., and Judge Kevin Korsmo. Absent were Thomas Cunnane, Lise Ellner, Anthony Howard, Horace Lee, Patrick McKenna, Christopher Rao, Rebecca Robertson, Karl Sloan, Gregory Thatcher, and Judge Ann Harper.

Chair Ken Master called the meeting to order at 9:35 a.m. Welcome and introductions were made around the table.

Chair's report:

Mr. Masters told the Committee that their report to the BOG is due in July and the July committee meeting will most likely be cancelled. He said there is a possibility for an August meeting, which if it takes place would be August 30, 2010.

Minutes:

The minutes from the April 19, 2010 meeting were approved by consensus with one change submitted by Mr. Horowitz via email to the Chair.

ESI Subcommittee:

Mr. Nunn reported the Subcommittee is continuing to work with ATJ Technology Subcommittee on a possible joint proposal to be presented to the full Committee and circulated over the summer. However, it is unclear whether they will be able to complete work on CR 34 by then. Mr. Horowitz received a counter proposal from Mr. Nunn and the ATJ Technology Subcommittee will meet in a couple of weeks to forward a substantive response. Mr. Horowitz stated they are also hoping to draft a proposal on

CR 26. Both rules will be dealt with separately, then forwarded to Mr. Nunn's subcommittee.

Criminal Rules Subcommittee:

Mr. Wachter reported the Subcommittee has prepared amendments and proposals to four different rules being considered by the Committee.

CrR 2.3 (Search and Seizure) – This was originally proposed to the committee by Steven Hobbs of the King County Prosecutor's Office. The subcommittee proposes amending the rule to allow for electronic application and granting of search warrants in a criminal investigation and that the proposed amendment is presented to the BOG as a committee proposal. They recommended adding paragraph (4) under subsection(c), authorizing electronic signatures. Under the proposed rule, a judge may be contacted for an electronic warrant, and if he agrees to receive it, the officer would send an email signed electronically under penalty of perjury. The court may approve the warrant and sign it electronically upon information showing probable cause. Mr. Wachter stated there is a growing body of statutory law governing electronic information, authorization, and allowance of electronic applications. Paragraph (5) addresses preservation of additional evidence; paragraph (6) issuance of email warrant by the court. Mr. Wachter explained that mechanically the rule is unchanged from the draft the committee originally received from Mr. Hobbs. Mr. Hobbs submitted the proposal to the judge's associations, but so far has not received approval from them. Mr. Wachter noted there was concern by SCJA about the mechanics of how the rule/process would work. He added that most judges who have seen the rule thought it was a good idea.

The subcommittee moved to adopt the proposed amendments. Discussion followed. Mr. Buzzard had concerns about potential discovery of judges' phone records, including records from police transmitted to judges machines (laptops, home computers, I-pads, etc.), and email trails created as result of electronic submission. He stated counties may have to provide computers for judges at home, at an additional expense, to avoid creating a record and preventing disclosure of private email addresses. Judge Gibson shared Mr. Buzzard's concerns and suggested setting up a Yahoo account specifically for search warrants, since these providers maintain off-site servers. However, this would not stop a defendant's search warrant for the actual computer itself. Judge Gibson also questioned the meaning of recording on line 3, page 199, which states, "The court shall record any additional evidence on which it relies." He described a hypothetical situation where an officer on the phone gives additional information that is not included in the email and whether it must be written down or recorded electronically. Mr. Trieweiler responded that all calls are recorded and if the information is not recorded, the reviewing court will not consider it; thus, if an officer wanted the information considered, the onus is on the officer to record it. Mr. Leishman commented the Public Records Act may be another aspect and some uncertainty exists as to criminal records and discovery, but that another BOG committee is working on this.

Ms. Engrav offered a friendly amendment, accepted by Mr. Wachter, to change “court’s” name on page 199, line 13 to “judicial officer’s” name, and insert on line 14, “peace” in front of “officer.”

Mr. Buzzard offered a friendly amendment, accepted by Mr. Wachter, to replace line 3, on page 199 with: “Any additional evidence on which the court relies, shall be preserved.” Ms. Engrav suggested replacing “preserved” with a more tangible phrase like, “such as by a recording.” Further discussion followed on responsibility of the party doing the recording and again on the mechanics of recording. Mr. Trieweiler suggested the rule be sent back to committee. The Chair agreed and asked the subcommittee also obtain comments from the judges.

CrR 4.8 (Subpoena Rule) - Mr. Wachter touched briefly on the history of the rule, which had been published for comment, and the Supreme Court’s request that the committee respond to the comments. At the last meeting, the Committee approved a proposed letter for the Chair to submit to the BOG; however, since then, the subcommittee found two additional issues. First, the proposed criminal rule does not address access to premises; secondly, the rule does not contain an explicit statement that the rule does not modify/amend any existing notice requirements or privacy protections. Mr. Wachter proposed two motions to handle each issue separately.

First Motion: Disclaimer Sentence (page 205, lines 12-14). Mr. Wachter explained the concern came from stakeholders who expressed confusion in responding to notice requirements. Mr. Trieweiler stated the issue originated from hospital associations regarding medical records and the proposed language sufficiently addressed their concerns. The subcommittee believes the proposed rule would have better chance of passage if they included a disclaimer provision. Mr. Wachter opined that it would also help new practitioners to know the bare minimum (“the floor”) notice requirement if nothing else applies--especially where notice to other parties is not required. There was discussion on language, whether to add “privilege” or “confidential”, change the heading to “other applicable law,” whether “modify” was the right word, and revising “provisions herein”. Ms. Engrav questioned whether the language was broad enough. Mr. Wachter had received comment from Pam Loginsky of WAPA who thought the rule should include reference to the constitution. There was quite a bit of discussion on “alter” versus “modify”, but the committee did not like alter and thought “modify or limit” would be okay. Two friendly amendments were made and the amended rule was approved 13 to 1.

Second Motion: Premises (pages 203-04, amended language appears in bold). As it currently exists, CrR 4.8 simply states that subpoenas shall issue as in civil actions (CR 45), which is why the subcommittee proposes a complete replacement of the rule. CR 45 allows for inspection of premises only after notice to the owner or occupier; however, the original proposed new CrR 4.8 did not include premises. Because the subcommittee could not affirmatively determine why “premises” was omitted from the Committee’s original draft, they felt it should be added. Mr. Trieweiler commented that it is not used often in civil work, but if premises were left out of the criminal rule, the

presumption is that there is no ability to inspect. The committee believed it was a good idea to put premises into the criminal rule to afford it higher protection through the courts. The Chair read from an email received from Pam Loginsky, who expressed dismay that the rule has been expanded to include premises. She cited concerns over constitutional violations of section 1, article 39, suggested the rule supersedes protections under other statutes, and emphasized there is no constitutional right for defendants to inspect premises. Ms. Brandes of NW Defenders Association opined that it is important for the defense to view the scene of a crime when it is at issue. She cited one example where inspection was critical in discovering the police had the wrong location. She stated the court's role as gatekeeper is a reasonable one to protect victim's rights, making determinations on a case by case basis. Ms. Engrav saw nothing in the proposed rule superseding privacy protections or infringing on constitutional protections. Mr. Underwood also agreed and did not want the rule to limit premises.

Mr. Juhl suggested adding provisions of CR 45 (c), (d), and (e) to the committee's criminal rule to parallel the civil rule. Without the provisions, he opined there is potential for abuse. He moved that the committee not adopt premises: however, if it is adopted, that the committee amends the rule to include those provisions. Mr. Trieweiler commented that he failed to see, with all due respect to Ms. Loginsky, that the rule expands any rights. He suggested the rule as written now actually restricts rights because one does not have to go to court. He stated the amended language puts all parties on notice and if they believe the request to be unreasonable, they have ample opportunity to make their objections known to the court. Mr. Wachter stated the subcommittee discussed proposing a rule to protect persons subject to inspection and notice provisions, but the default position is always to the CRs. There were several friendly amendments, one minor, and one major from Mr. Trieweiler to add the following to line 2, page 204, "provided that subpoenas to inspect premises may not be combined with other subpoenas pursuant to this rule." The amended rule adopting premises passed 13 to 1. Mr. Juhl then withdrew his earlier proposed motion/amendment.

CrR 4.11 (Recording Witness Interviews) – Mr. Wachter recounted the history of the rule where five years ago, the Committee approved and submitted the rule to the BOG for recommendation to the Supreme Court, who ultimately rejected it. Mr. Wachter explained the rule has been brought back again because recording is now a commonly accepted practice. Parties may make private agreements to allow recording. Mr. Wachter stated the proposed rule seeks to govern the process. The subcommittee met with various stakeholder groups who wanted to include the right to refuse to be interviewed and protections against dissemination. The subject matter of witness interviews are often very sensitive and the groups wanted protection against improper disclosure. Currently, the rule proposes that witnesses are required to be recorded. Mr. Wachter stated there is a fundamental disagreement within the subcommittee on mandatory recording, but complete agreement regarding dissemination. The subcommittee discussed "what if" worse case scenarios of dissemination. One scenario

depicted a request by a defendant for the prosecutor's file under the Public Records Act. Since recorded interviews do not quite fit the definition of attorney work product, if it is considered exculpatory, prosecutors would be obligated to turn it over under CrR 4.7. To address these concerns, the subcommittee drafted strict language in subsection (b) to require a court order upon showing of good cause relating solely to the criminal case. Mr. Wachter stated recordings are happening all the time and there is concern about what is happening to records of transcripts because different judges will have different interpretations of the Act. He said the proposed rule attempts to deal with the void in the criminal rule.

Ms. Engrav suggested a preliminary step include the victim's right to refuse, since that would allow the rule a better chance to pass and give privacy protections to recordings. Mr. Underwood urged the Committee to adopt the rule allowing mandatory recording. He cited as reasons problems conducting cross-examination without a verbatim transcript, to prevent lying or manipulation of testimony at trial. He also supported videotape recordings. Mr. Cava agreed recordings would stop disputes over testimony. He pointed out the recording rule protects victims' rights to a certain extent, since depositions are more intimidating and the defendant has a right to be present; whereas, there is no defendant right at witness interviews. Mr. Underwood stated in his experience, recorded interviews are more civil and less costly. He did not agree with the position allowing witnesses the right to refuse, but agreed the dissemination provision provided sufficient protection. Mr. Buzzard concurred, and added that witnesses can refuse, which triggers CrR 4.6. Mr. Juhl supported the recording rule, since it is already happening, but not the mandatory rule. He did not believe choice (of being interviewed) should be taken away and, in some cases, the right to privacy on medical or mental issues which are unrelated to the issue. He urged the committee to respect the rights of witnesses who do not wish to be recorded.

Mr. Juhl moved, seconded by Mr. Buzzard, to amend the rule with the following language at the end of subsection (a), "including the right to decline being interviewed or having an audio recording of the interview." Discussion followed on whether interviews are considered a private conversation. Mr. Triewiler stated if the committee adopts the right to refuse amendment, it would make the rule meaningless. He opined the stakes are too high in criminal cases where defendants face long sentences, and the witness has an interest in the outcome that creates a personal bias that could lead to mistakes and confusion. He did not support the view that these were private conversations subject to protections, when the interview is later disclosed. He stated there were three exceptions under PRA: where necessary for effective law enforcement, to protect a person's privacy, and other law (where this rule applies). The PRA does not have an exception to right of refusal. Both Ms. Engrav and Mr. Cava pointed out the proposed rule, without the amendment, does not affect the legal right of witnesses to go to court for a protection order or to prohibit recording. Ms. Brandes commented that most witnesses are officers who generally refuse recording and agreed that interviews are not a private conversation. She opined a recording gives certainty which is valuable in appellate cases where years later, the witnesses have trouble recalling. The motion to adopt the amendment failed 1-11-2.

The Committee returned to the main motion. Mr. Wachter stated the rule is not intended to address videotaping because privacy concerns are magnified if victims are shown on tape and disseminated. The committee had no desire to go there. Mr. Wachter accepted a friendly amendment from Ms. Engrav to change the name of the rule to, "Recording Interviews of Witnesses." The motion to adopt the rule passed 10-3-1 (Mr. Wachter abstained).

CrRLJ 7.3 (Judgment Rule) – The Committee was asked by the Supreme Court to comment on the comments received for this rule. It was noted that the rule was not proposed by the Committee, but by DMCJA. Mr. Wachter reported the two changes to the published rule are: 1) cite to the statute or ordinance for which the defendant was sentenced; and, 2) identify charges under the law which are domestic violence offenses. The subcommittee responded to a stakeholder concern over how domestic violence offenses are designated and propose an amendment that DV offenses should reflect the actual finding by the court upon a guilty plea or a conviction. The subcommittee drafted a statement for the Chair to submit to the BOG recommending the amendments. Judge Gibson offered a friendly amendment, which was accepted, to (c): strike first part of the sentence and begin with "Citation." A second friendly amendment to change "charge" to "conviction" in (d) was declined. The motion to adopt the amended rule and the subcommittee's proposed changes, which shall be reflected in the Chair's letter to the BOG, passed 13-0.

Subcommittee X:

Ms. Engrav reported the subcommittee received some additional feedback on the final proposal of MARs from WSAJ last week raising new concerns. The subcommittee felt the issues were well covered and should not be revisited. The Chair reported that WSAJ has withdrawn their concerns.

The meeting adjourned at 12:55 p.m.