



# WSBA

COURT RULES AND PROCEDURES COMMITTEE

## Meeting Minutes May 16, 2011

Committee Chair Ken Masters called the meeting to order at 9:31 am.

Members present: Chair Ken Masters, Edwin Aralica (by phone), Lincoln Beauregard, Roy Brewer, David Bufalini (by phone), Steven Buzzard, Mario Cava, Paul Crisalli, Rebecca Engrav, Beth Fraser, Justo Gonzalez, Shawn Larsen-Bright (by phone), Jeannie Mucklestone, Bryan Page (by phone), Shannon Ragonesi, Aaron Rocke (by phone), Karl Sloan (by phone), Derek Smith, Gregory Thatcher, and Judge Blaine Gibson. Also attending were Nan Sullins (AOC Liaison), Marc Silverman (BOG Liaison, by phone), Nikole Hecklinger (SCRAP), Elizabeth Turner (WSBA Assistant General Counsel), and Anna Schmidt (WSBA Paralegal).

### **Minutes**

The April 18, 2011 meeting minutes were approved by consensus, with one correction to the spelling of Karl Tegland's name on page 172 noted by Judge Gibson.

### **Chair's Report**

Chair Ken Masters discussed RAP 18.13A's ad hoc subcommittee, which has so far had two very productive meetings. Their next meeting is scheduled for June 3, 2011. Judge Korsmo gave the subcommittee a copy of the Court of Appeal's proposal [regarding the termination appeals issue], which hasn't yet been submitted to the Supreme Court. Thus, the next RAP 18.13A subcommittee meeting will focus on reconciling the subcommittee's version with that of the Court of Appeals. The Committee will see the amended version offered by the subcommittee before it goes to the BOG

### **Subcommittee Reports**

Subcommittee X: Ms. Engrav reported that the matters they've been working have already been brought before the larger Committee. The Subcommittee sent out a memo regarding the "Days are Days" proposal. Ms. Engrav listed the recipients of the memo in the meeting materials [see p. 178] and asked Committee members to let her know if there is some other group who should also receive the memo. She has not yet

received any comments back, specific to the proposal, from any of the memo's recipients.

The Subcommittee has separately been reviewing the counting backwards issue, which is a problem that was flagged by earlier chairs as an issue. Problems arise partly due to the variation in county local rules.

Ms. Engrav also reported that they received a proposal from the SCJA, which gives procedures for trial court judges to follow when a pro se defendant in a trial case wants to question witnesses. The purpose of their proposed rule is to give the judges some guidance regarding constitutional issues. Ms. Engrav reported that the subcommittee has not yet had time to discuss this proposal. Ms. Turner explained that it would be difficult to send the SCJA comments before the Court's August 30 deadline. Ms. Sullins explained that the court is making this an expedited issue due to proposed legislation on this issue. Ms. Turner stated that the Committee would be able get its response to the Court by the end of September, after the September BOG meeting.

*Infractions Subcommittee:* Mr. Buzzard reported that they had a subcommittee meeting this morning regarding proposals, sent in by Ms. Mucklestone and hopes to have something to report by the next meeting.

At the request of the Chair Ms. Mucklestone gave some background to her proposals. She stated that they're based on problems she saw on a day to day basis at the court and hopes to clarify the problems there. These are civil cases. IRLJ 2.1 gives the defendant notice of what he is being charged with and who is charging him. The rule states the notice must include the officer's name and, if applicable, the number of the citing officer. Ms. Mucklestone feels it's important to state both because if the ticket isn't electronic, it's hard to read the officer's name.

IRLJ 3.1 allows the prosecuting attorney to subpoena the officer to be in court without requiring the prosecutor to give the defendant notice. Ms. Mucklestone stated that this blindsides defendants and proposes that each party must give the opposing party a copy of that subpoena. Ms. Mucklestone also suggests that the rule include a citation to the rule which requires service.

Regarding electronic tickets, under IRLJ 2.2, Ms. Mucklestone would like to shorten the time period for filing notice of the ticket. Having a 5-day time period just slows things down. She suggests the time period be returned to 2days for the electronic tickets and remain 5 days for written tickets.

Ms. Mucklestone also opined that a defendant should be served electronically only if they agree to that type of service. IRLJ 2.6, regarding scheduling of hearings, deems a traffic infraction to be admitted unless a person sends in a response within 15 days (default). Ms. Mucklestone believes something needs to be addressed with the calculation of days so that if the person physically is unable to get a response

postmarked by the 15<sup>th</sup> day (due to that day being a legal holiday, for example) then there is some leeway.

IRLJ 2.6 contains a provision allowing waiving of the pre-hearing conference according to the local rules. The problem is contested hearings are being cancelled, and prehearing conferences scheduled, without notice going out to anyone. Thus, the prehearing conference may end in a default. Ms. Mucklestone thinks notice should be given.

Ms. Mucklestone is proposing these changes to facilitate a smoother process and level the playing field. Chair Ken Masters stated that he would like to see the subcommittee clean up the language before the proposals are sent for out to stakeholders for comment. Mr. Brewer commented on the photo-ticket infractions rules. It isn't in the statute that the vehicle owner must provide information about who is driving, even though it is asked on the form to contest such tickets. Mr. Silverman stated that he too had a citation and lost a copy of the ticket. Because it was electronic, the court told him it would take a few days to get it entered into the system and that he would need to call back in a few days to request the copy. Ms. Mucklestone stated that this is one of the things she's requesting be changed.

Further discussion ensued regarding the language in the proposed rules.

ESI Subcommittee: Chair Ken Masters gave an update due to Subcommittee Chair Hillary Evans' absence. He spoke with Mr. Horowitz (ATJ Technology Subcommittee) regarding CR 34 and they came to an agreement, which was approved by our subcommittee. There is now only one issue which is outstanding, which is using either the terms "form or forms," or the term "form or formats." The subcommittee will now discuss the proposal with the ATJ Board and SCJA. If the ATJ Board itself is insistent on using the term "format," then this issue will come again before the Court Rules and Procedures Committee. Otherwise, the proposal will go before the SCJA and, if they approve of it, then it will come before this Committee for a vote before going to the BOG. Mr. Masters felt the subcommittee was close to getting all of the issues with proposed CR 34 resolved. He has heard that trial judges are very interested in this rule.

Mr. Silverman stated that this effort speaks to the notion that, even though we provide pro bono services, we need to make sure that we provide rules that can effectively be utilized by pro se parties. Mr. Silverman supports the subcommittee's effort.

ER Subcommittee: Mr. Cava stated there's no action to report on. They received materials from Subcommittee X regarding the proposed Forfeiture By Wrongdoing Rule, applied under 804(b)(6). According to Mr. Cava, the subcommittee needs to decide whether it's appropriate to address this issue again. The last time Subcommittee X looked at this proposal, the Committee decided to take no action on it. The ER Subcommittee must determine whether they should reach out to additional stakeholders.

Mr. Cava explained that Mr. Tegland's proposal last year was for Washington to adopt the language from Federal ER 804, Forfeiture By Wrongdoing, which would be an exception to the hearsay rule. This issue is complex because a defendant has a right for the victim to appear before them, and the *Mason* case (160 Wn.2d 910, 162 P.3d 396) makes it a constitutional issue. Subcommittee X decided last year not to adopt the rule. Ms. Engrav opined that it is up to the ER Subcommittee to decide whether to review the proposal again. Mr. Cava stated that last year's Chair wanted WAPA to be involved more in the discussion.

Judge Gibson asked if the Committee has received a copy of the SCJA's comment letter regarding CR 4.11 (the witness recording rule, which this Committee drafted and which was approved by the BOG for submission to the Court; the proposed rule was published for comment). The SCJA voted to take no position on the rule but did comment. They were concerned that such a rule might be abused by pro se defendants. There are many comments on this rule. The Chair pointed out that many people are entrenched in this issue, and Ms. Turner stated she anticipates the Court will be asking this committee to respond to the comments.

The meeting adjourned at 10:15 a.m.