



WSBA

COURT RULES AND PROCEDURES COMMITTEE

Meeting Minutes

June 17, 2013

Committee Chair Hillary Evans Graber called the meeting to order at 9:37 a.m.

Members present: Chair Hillary Evans Graber, Katharine Bond, Dean Chuang (by phone), Paul Crisalli (by phone), Anne M Cruser (by phone), Anthony DiTommaso Jr., Eric W. Eisenberg (by phone), Sean J. Flynn (by phone), David M. Iseminger, Kailin James, Shannon Kilpatrick, Shawn Larsen-Bright, Roger A. Leishman, Nicole McGrath, Jeannie Mucklestone (by phone), Bryan Page (by phone), Shannon Ragonesi (by phone), David Stevens (by phone), Ann Summers, Judge Kevin Korsmo (by phone), and Judge Rebecca Robertson.

Members excused from attending: Gene Barton, Roy Brewer, Leslie Clark, Maureen M. Cyr (hiatus), Elizabeth A. Fraser, Dale Johnson, Kathleen Nelson, Karen Denise Wilson and Judge Blaine Gibson.

Members who did not respond to meeting notice or attend meeting: Daniel Brown.

Non-Members/Guests present: Don Horowitz (by phone), and Nancy Talner (Attorney at ACLU).

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

Minutes

The May 20, 2013 meeting minutes were approved by consensus, with two corrections.

Old Business

None.

New Business

RAP Subcommittee: Subcommittee Chair Ann Summers reported as follows:

- Additional review of amendments proposed by the Court of Appeals:
 - RAP 10.10: The Subcommittee again reviewed the Court of Appeals' proposed amendments to RAP 10.10 and was unable to come to a consensus on the proposed

amendments to subparagraph (a): half of the Subcommittee supported the Court of Appeals' proposed amendment with no changes, and the other half supported the proposed amendment but wanted to limit the statement of additional grounds to claims relevant to the decision under review. The Subcommittee agreed with the Court of Appeals' proposed amendments to subparagraph (c).

The Subcommittee noted that if the Court of Appeals was going to change *appellants* to *defendants* in parts of the rule then it must be changed through the entire rule. The Subcommittee also performed some "which doctor" work on this rule. The language in the Subcommittee's proposal reflects those changes.

- RAP 18.13A: The Subcommittee agreed with the Court of Appeals' proposed changes but felt the rule would read better if what the Subcommittee believed to be two superfluous *ands* were removed from paragraph (a). Judge Korsmo explained that the *ands* should not be deleted, because of the structure of the included list. After discussion, the Committee suggested that commas be added as follows: ". . . under RCW 13.36₂ may be. . . ." and ". . . under RCW 13.36₂ shall be. . . ."

After additional discussion, the Committee voted unanimously to approve the Subcommittee's proposed response on RAP 10.10(c) and 18.13A and then separately voted 12-3-1 to approve the Subcommittee's proposed response on RAP 10.10(a).

- The remaining proposed PRP amendments were next discussed, as follows:
 - RAP 16.3: After the discussion at the May meeting, the Subcommittee felt that deleting subsection (b) would confuse the public. After discussion, the Committee voted 15-0-1 to approve the proposed amendment to RAP 16.3.
 - RAP 16.5: The Committee made the following friendly amendments to the Subcommittee's proposal: Existing subparagraph (b)(2), originally proposed by the Subcommittee to be subsumed into new subparagraph (c), is moved and becomes (b)(3). With that revision, the Committee unanimously approved of the Subcommittee's proposed changes.
 - RAP 16.8: The Committee made the following friendly amendments:
 - (a) **Filing Fee.** A personal restraint petition will be filed by the clerk of the appellate court only if the statutory filing fee is paid, unless the appellate court determines that the petitioner is ~~unable to pay the filing fee~~ indigent. The statute ~~requiring~~ governing payment of a fee for filing a petition for writ of habeas corpus is controlling.

In addition, the reference to "16.7.7" in proposed new subparagraph (c) was corrected to "16.7." With those friendly amendments, the Committee voted 14-2 to approve the proposed amendments to RAP 16.8.

- RAP 16.8A: The Committee unanimously voted to approve the Subcommittee's proposed new RAP 16.8A.
- RAP 16.9: The Committee unanimously voted to approve the Subcommittee's proposed amendment to RAP 16.9.
- RAP 10.2: The Committee next turned to RAP 10.2, Time for Filing Briefs. Ms. Summers explained that the Subcommittee had worked closely with WALA but had been unable to agree to WALA's proposed amendments. The Subcommittee included its proposed compromise language, as well as the language originally proposed by WALA, in the meeting materials.

Mr. Masters explained that the Court was not getting amicus briefs in time for them to be taken into consideration when the bench memos are drafted, and that it was problematic for appellate counsel to be forced to respond to amicus briefs during the 30 days before oral argument, when they should be focused on preparing for oral arguments. Ms. Talner stated that it was her understanding that Commissioner Goff supports WALA's proposal and since the current rule is 30 days, it would be clear how long it would be before the oral argument. Ms. Talner opined that the proposed 45 days from acceptance of review is enough time for briefs to be filed. Mr. Leishman opined that the Court wants to receive the response to the amicus briefs and WALA's proposal is more problematic. Mr. Crisalli stated that he prefers the 45-day time frame because the amicus brief is important and not supplemental.

The Committee discussed what would happen to WALA's proposal and whether it should be submitted to the BOG. Mr. Masters suggested that both proposals should be submitted to the BOG with a recommendation as to which proposal the Committee is recommending. After further discussion, the Committee approved unanimously to recommend the Subcommittee's proposed amendment to RAP 10.2 to the BOG and to include WALA's proposal in the BOG materials so the BOG can compare the two.

The Committee took a 5-minute break before continuing on to the other agenda items. Various Committee members signed off at various points during the meeting and were not present for the rest of the votes.

ESI Subcommittee: Subcommittee Chair Shawn Larsen-Bright reported that the Subcommittee has been working on CR 26. The ATJ Technology Committee proposed substantial revisions to the Subcommittee's current language, and the Subcommittee is far from completing its work on ATJ's proposals. Mr. Larsen-Bright informed the Committee that this item on their agenda will not be completed this year and will be carried over to next year. Mr. Horowitz reported that the ATJ will put materials together.

Subcommittee X: Subcommittee Chair Gene Barton was not present, so Tony DiTommaso Jr. reported on behalf of the Subcommittee.

- GR 30(b) and CR 5(b)(7): The Subcommittee reviewed the proposed amendments to GR 30(b)(4) and CR 5(b)(7) that the King County Bar Association submitted to the Court, which the Court forwarded to us for review and comment. The proposed amendments would allow counties that now have a local rule mandating electronic filing to also adopt a local rule to mandate electronic *service*. The proposed amendments will not affect pro se parties. King County and Pierce County have adopted local versions of GR 30(b)(5). Mr. DiTommaso Jr. explained that the Subcommittee felt it would work better if existing GR 30(b)(4) and (5) were consolidated into one subparagraph that addresses both electronic filing and electronic service. Mr. Larsen-Bright opined that he supports the proposed amendments and the changes made.

The Committee made the following friendly amendments to the first sentence of GR 30(b)(4): “. . . and/or electronic service . . .” and to the final sentence of the paragraph: “Electronic filing and/or service should not serve as a barrier to access.” With those friendly amendments, the Committee unanimously approved the revised version of GR 30(b) and a complementary revision to CR (5)(b)(7), at pages 393 & 395 of the materials, for submission to the BOG.

- ER 901: The Committee’s previously proposed amendment to ER 901 was approved by the BOG and published for comment by the Court, and the Court has asked us to respond to the comments received. Mr. DiTommaso Jr. reported that the comments caused Mr. Barton to question the need for the proposed amendment originally proposed by the Committee, but that the Subcommittee had not been able to come to a consensus or formulate a response to the comments, so they were bringing the issue to the main Committee.

The proposed amendment, as published, was originally suggested to the Committee by Karl Tegland, who has apparently changed his mind about the necessity for the proposed amendment. The Committee discussed the authenticity and forgery aspect of ER 901. Mr. Masters opined that the proposed amendment to ER 901 is an illustration of how an e-mail could be authenticated and is not a rule, and if attorneys or the courts do not find it helpful then it is not required to follow the illustration. The Committee’s discussion focused on how e-mails can be determined to be genuine or authentic when it is very easy to forge or spoof e-mails. Mr. DiTommaso Jr. moved to recommend to the BOG that the Committee felt the comments were well taken and that the existing proposed amendment to ER 901 should be pulled; Ms. Kilpatrick seconded that motion. The motion failed 4-8, with 2 abstentions.

Ms. James moved to recommend Mr. Tegland’s proposed fix (page 415 of the materials) for approval by the BOG; Ms. Summers second that motion. Mr. Masters opined that it is a good change. After further discussion, the motion carried unanimously.

RALJ Subcommittee: Subcommittee Chair Kailin James reported the following:

- RALJ 11.7 & 5.4: The King County Prosecuting Attorney’s office submitted proposed changes to RALJ 11.7 and 5.4 to the Court, which the Court asked us to review.

- The Subcommittee voted not to recommend the changes proposed by the King County Prosecuting Attorney and developed some edits to the King County Prosecuting Attorney's suggested amendments to RALJ 5.4 which they believe eliminate the need to amend 11.7.
- RALJ 5.4: The Committee discussed the proposed edits suggested by the Subcommittee and made the following friendly amendments to the edits proposed by the Subcommittee [additions are double underlined, deletions are strikethrough]:

. . . The ~~trial~~ court of limited jurisdiction will not relitigate a pretrial matter or a trial for which there is an electronic record subject to appellate review, unless ~~the appellant demonstrates a court determines~~ that the pretrial matter or the trial was materially affected by the lost electronic record. . . .”

- RALJ 2.2: The Committee made the following friendly amendments to the edits proposed by the Subcommittee [additions are double underlined, deletions are strikethrough]:

(d) Errors Raised for First Time on Review Appeal. The appellate superior court may refuse to review any claim of error ~~which that~~ was not raised in the ~~trial-court~~ court of limited jurisdiction. However, a party may raise the following claimed errors for the first time ~~in the appellate court on appeal~~: (1) lack of ~~trial-court~~ jurisdiction, (2) failure to establish facts upon which relief can be granted, and (3) manifest error affecting a constitutional right. ~~A party or the court may raise at any time the question of appellate court jurisdiction.~~ A party may present a ground for affirming a ~~trial-court~~ decision of a court of limited jurisdiction ~~which that~~ was not presented to ~~the trial~~ that court if the record has been sufficiently developed to fairly consider the ground. A party may raise a claim of error ~~which that~~ was not raised by the party in the ~~trial-court~~ of limited jurisdiction if another party on the same side of the case ~~has raised~~ the claim of error in ~~the trial~~ that court.

After discussion of all the proposed amendments, the Committee voted 11-0, with 1 abstention, to recommend the revised proposed amendments to RALJ 5.4 and 2.2 to the BOG for approval, and to recommend that the BOG not support the King County Prosecuting Attorney's proposed amendment to RALJ 11.7.

Other new business: Ms. Turner informed the Committee that because every item on the agenda was voted on and the Subcommittees have no further work at this time which must be voted on by the main Committee there will not be a July 15th Committee meeting. If the BOG does not send items back to the Committee for further work, the August 19 and September 16 meetings will be cancelled, too. Ms. Turner and the Chair will let the Committee know after the BOG meeting on July 26.

Mr. Masters thanked the Committee, on behalf of the BOG, and thanked everyone for all their hard work, and stated that this Committee's work is very much appreciated by the BOG.

The Chair thanked everyone for all their hard work and the time they spent on Committee and expressed great gratitude for a tremendous year. The meeting adjourned at 1:00 p.m.