



WSBA

COURT RULES & PROCEDURES COMMITTEE

Telephonic Meeting

Agenda

April 15, 2013
9:30 a.m. to 1:00 p.m.
Washington State Bar Association
1325 Fourth Avenue – Sixth Floor
Seattle, Washington 98101

1. **Call to Order/Preliminary Matters**
 - Approval of Minutes (see Minutes of February 25, 2013, *pp.* 249-253)
 - Approval of Minutes (see Minutes of March 18, 2013, *pp.* 255-256)

2. **Old Business**

3. **New Business/Subcommittee Reports**
 - Rules of Appellate Procedure Subcommittee (RAP): Ann Summers (see March report, *pp.* 257-258)
 - Rules for Appeal of Decisions of Courts Limited Jurisdiction Subcommittee (RALJ): Kailin James (verbal report)
 - Electronically Stored Information (ESI) Subcommittee: Shawn Larsen-Bright (verbal report)
 - Subcommittee X: Gene Barton (verbal report)

4. **Other Business/Good of the Order**

5. **Adjourn**



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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.



WSBA

COURT RULES AND PROCEDURES COMMITTEE

Telephonic Meeting

Meeting Minutes

March 18, 2013

Committee Chair Hillary Evans called the meeting to order at 9:30 a.m.

Members present: Chair Hillary Evans, Leslie Clark, Paul Crisalli, Tony DiTommaso, Jr., Eric W. Eisenberg, David M. Iseminger, Kailin James, Dale Johnson, Shawn Larsen-Bright, Nicole McGrath, Kathleen Nelson, Shannon Ragonesi, Ann Summers, Karen Denise Wilson, Judge Kevin Korsmo and Judge Blaine Gibson.

Members excused from attending: Maureen M. Cyr, Shannon Kilpatrick, and Bryan Page.

Members who did not respond to meeting notice or attend meeting: Gene Barton, Katharine Bond, Roy Brewer, Daniel Brown, Dean Chuang, Anne M. Crusier, Sean J. Flynn, Elizabeth A. Fraser, Jeannie Mucklestone and David Stevens.

Non-Members/Guests present: Shane Carew.

Also attending: Nan Sullins (AOC Liaison), Elizabeth Turner (WSBA Assistant General Counsel – Staff Liaison) and Sherry Mehr (WSBA Paralegal). Ken Masters (BOG Liaison) was unable to participate in this meeting.

Minutes

The February 2013 Minutes were deferred to the April 15, 2013 meeting.

Old Business

UCLA Rules: The Chair reported that the BOG meeting went well and the Revised UCLA Rules were approved with the Committee's suggested changes, subject to the conditions requested by the Committee.

JuCR 9.3: Mr. Barton was not in attendance, so Ms. Turner reported that the Committee received a letter from Justice Johnson stating that the Supreme Court Rules Committee has

granted the Northwest Defendants' request to withdraw the proposed rule. The Chair and Ms. Turner thanked Subcommittee X for all their hard work on JuCR 9.3.

New Business

RAP Subcommittee: Subcommittee Chair Ann Summers reported that the subcommittee met on March 14 and primarily focused the thirteen suggested rule amendments proposed by the Court of Appeals. The subcommittee is suggesting grammatical changes to some of the proposed amendments and does not support two of the proposed amendments. Ms. Summers will write a summary of the meeting. Ms. Summers further explained that the subcommittee is still reviewing a proposed change to RAP 8.1 submitted to the committee by former committee member Neil Wachter; Mr. Wachter is reviewing suggested edits and the proposed amendment is not ready to be brought forth to the Committee at this time but will be before year end.

RALJ Subcommittee: The Chair welcomed the new RALJ Chair, Kailin James, and inquired if the subcommittee had any updates. Subcommittee Chair James reported that the subcommittee missed its previously scheduled meeting but will have a regular meeting schedule; the next meeting is Wednesday, March 20. Ms. James thanked the Chair for appointing her as subcommittee chair.

ESI Subcommittee: Subcommittee Chair Shawn Larsen-Bright reported that the subcommittee has received input from the ATJ in regards to the current proposed versions of Rule 26 and Rule 31. Mr. Larsen-Bright anticipates a report to the Committee in the middle of April.

Subcommittee X: Ms. Turner reported that with the completion of JuCR 9.3 Subcommittee X can now resume work on their original agenda.

Other new business: Ms. Turner reported that the comment period on the Revised Proposed Family Law Civil Rules will expire April 30 and the Committee should prepare itself to respond to the comments. Ms. Turner further explained that the Local Rules Task Force (LRTF) charter was renewed for two more years but we anticipate this Committee will work with LRTF on responding to comments and on any other changes to the CRs which may be implicated. The LRTF will also need to respond to ATJ subcommittee's comments previously submitted. Ms. Turner reminded the Committee that the ATJ is endorsing "plain language" in rules and that this may become more of an issue as time goes on, for all court rules.

Ms. Turner thanked the Committee and reminded everyone that the next meeting is on April 15, 2013.

The Chair thanked everyone for participating, and the meeting adjourned at 9:45 a.m.



March 29, 2013

MEMORANDUM

TO: Hilary Evans, Rules Committee Chair

FROM: Ann Summers, RAP Subcommittee Chair

SUBJECT: Summary of March 14, 2013 meeting

The subcommittee reviewed the RAP amendments proposed by the Washington State Court of Appeals that were submitted to the Washington Supreme Court on February 12, 2013.

The subcommittee agreed that the proposed amendments to RAP 2.2(c), 5.3(a) and (j), 5.4(a), 9.6(b)(1) and 17.4(b) should be supported, without any changes.

The subcommittee suggests the following grammatical and/or stylistic changes to the proposed amendments to RAP 6.2(c), 9.7(b), 16.2(b), 16.14(a), 17.1(a) and 18.3(b) (subcommittee changes are highlighted and comments added where appropriate to explain suggested change):

RAP 6.2(c) DISCRETIONARY REVIEW

(c) Regular Motion Procedure Governs. A motion for discretionary review is governed by the motion procedure established by Title 17. The motion and the response shall **should** append those portions of the record below to which the motion or response refer. The appendix should include a table of contents and the pages should be consecutively numbered.

RAP 9.7(b) PREPARING CLERK'S PAPERS AND EXHIBITS FOR APPELLATE COURT

(b) Exhibits. The clerk of the trial court shall assemble those exhibits designated by the parties and prepare them for transmission to the appellate court. Exhibits ~~which~~ **that** are papers should be assembled in the order the exhibits are numbered with a cover sheet ~~which~~ **that** lists only the exhibits being transmitted and is titled "Exhibits."

RAP 16.2(b) ORIGINAL ACTION AGAINST STATE OFFICER

(b) Initiating Proceeding. The proceeding is initiated by filing the petition in the Supreme Court and serving filing proof of personal service of the petition on the proper parties. The petition must be noted for hearing before the commissioner or clerk as provided in rule 17.4 for motions. The notice of hearing should be served with the petition. Service of the petition and notice must be made as provided in the Superior Court Civil Rules and statutes for service of a summons in a superior court action. The clerk of the Supreme Court will note the petition for hearing and provide notice to the parties.

RAP 16.14(a) PERSONAL RESTRAINT PETITION-APPELLATE REVIEW

(a) Decision Whether to Transfer. A decision to transfer a petition to a superior court for a hearing or to retain the petition for determination by the appellate court is not subject to review by the Supreme Court. A superior court decision pursuant to CrR 7.8 to transfer a motion to the Court of Appeals for consideration as a personal restraint petition pursuant to CrR 7.8 is not subject to direct review by the Supreme Court.

RAP 17.1(a) SCOPE

(a) Relief Under This Title. A person may seek relief, other than a decision of the case on the merits, by motion as provided in Title 17. In a criminal appeal where the defendant is represented by counsel, the defendant may only file a pro se motion related to a statement of additional grounds for review or the representation of counsel. Other pro se motions submitted by a defendant who is represented by counsel will be placed in the file without action. Any such action is not subject to the provisions of rule 17.7.

Comment: The subcommittee thought that adding “pro se” makes it clear that motions filed by counsel are not limited.

RAP 18.3(b) WITHDRAWAL BY COUNSEL

(b) Civil Cases. Except as otherwise provided in this section, withdrawal by counsel in a civil case shall be governed by CR 71. If a notice of intent to withdraw is given before oral argument, the notice should include the date set for oral argument. Any reference in the notice to the clerk of the court shall mean the clerk of the appellate court. The notice to withdraw from representation in the appellate court should be filed in the appellate court, which will decide such motion.

Comment: The subcommittee thought that adding “from representation in the appellate court” draws a necessary distinction where a party is represented by different counsel in the trial and appellate court.

The subcommittee did not support the amendments proposed by the Court of Appeals to RAP 10.10(a) and (c) and 18.1(b). The subcommittee thought that the amendments proposed to RAP 10.10(a) and (c) were too restrictive by limiting the ability of defendants to file statement of additional grounds, particularly where a defendant is trying to exhaust state remedies for purposes of federal habeas review. The subcommittee thought that the amendment proposed to RAP 18.1(b) would create unnecessary work for parties and the court, by requiring a party to request attorney fees in the appellate court in the motion for discretionary review. The

subcommittee thought that a party should be entitled to wait to make that request later to the appellate court, or to make it in the trial court instead.

The subcommittee discussed the proposed amendment to RAP 8.1, Supersedeas Procedure. The subcommittee was unable to reach a consensus on the wisdom of the wording and scope of all of the changes proposed. There appears to be consensus that the rule is not clear as to the standard that applies to cases where injunctive relief limiting the use of real property has been granted below, and that the standard set forth in (b)(3) should apply in such cases . There appears to be strong consensus that the rule should direct the court to consider the injury to other persons and the public in (b)(3). Neil Wachter will contact other practitioners in practice areas likely to be affected by these proposed changes, and possibly redraft his proposal for the next meeting.

The next meeting is scheduled for April 11, at 2 p.m.