

**Bench-Bar-Media Committee
Business Meeting**

**Administrative Office of the Courts
455 Golden Gate Avenue
Sequoia Room, Third Floor
San Francisco, CA 94102-3688**

October 29, 2009

Minutes

Members Present: Hon. Carlos R. Moreno, Chair; Mr. Ralph Alldredge; Ms. Cristina C. Arguedas (*by phone*); Mr. Anthony P. Capozzi; Mr. Ed Chapuis; Ms. Karen Dalton; Hon. Peter Paul Espinoza; Dr. Félix Gutiérrez; Mr. Rex S. Heinke; Hon. Jamie A. Jacobs-May; Mr. David Lauter; Hon. Judith D. McConnell Mr. Greg Moran; Hon. William J. Murray, Jr.; Mr. Royal F. Oakes; Mr. John Raess; Ms. Kelli L. Sager; Mr. Peter Scheer; Mr. Stan Statham; and Mr. William C. Vickrey.

Members Absent: Mr. Steve Cooley; Mr. John Fitton; Mr. Ronald G. Overholt; and Mr. Jonathan Shapiro.

Liaison Present: Hon. Steven Z. Perren.

Guest Speakers: Mr. Daniel Pone and Ms. Ann Springgate.

Staff Present: Mr. Peter Allen and Ms. Claudia Ortega.

Additional Attendees: Administrative Office of the Courts (AOC) staff Mr. Philip Carrizosa, Ms. Lynn Holton, Mr. Kenneth L. Kann, Ms. Leanne Kozak, Mr. Patrick O'Donnell, and Ms. Linda Theuriet.

Item 1 Welcome and Introduction of Members

Justice Carlos R. Moreno called the meeting to order at 10:00 a.m. He welcomed the committee members and reminded them that judges cannot comment on the specifics of pending cases.

Committee members and staff introduced themselves. Justice Moreno introduced Justice Steven Z. Perren (Associate Justice of the Court of Appeal, Second Appellate District, Division Six), the committee's new liaison to the Judicial Council's Criminal Law Advisory Committee. Justice Perren currently serves as chair to this committee. Because of

overlapping issues, he has been invited to participate on the access working group and serve as a facilitator during the discussions of the working group recommendations.

Justice Moreno also noted that Mr. Jonathan Shapiro is a new committee member but could not attend today's meeting.

Item 2 Update Regarding the Development of a New Rule of Court Concerning Public Access

Justice Moreno introduced Mr. Daniel Pone (Senior Attorney, Office of Governmental Affairs, AOC) and Ms. Ann Springgate (Attorney, Office of the General Counsel, AOC). Both have been working on rule proposals that would provide public access to various nondeliberative and nonadjudicative court records relating to the administration of the courts. They explained that the Legislature mandated the Judicial Council adopt rules of court by January 1, 2010 that provide public access to nondeliberative or nonadjudicative court records.

Staff reported that it has had several meetings and conference calls with the press, bar, bench, court leaders, First Amendment advocates, and others to collect feedback that has been used in drafting the rule proposals. They explained that the current draft proposes the adoption of California Rules of Court 10.500 and 10.501, the repeal of rule 10.802, and amendment of rule 10.803. The proposed rules draw from the California Public Records Act (CPRA) and the Legislative Open Records Act (LORA), but their provisions have been modified to reflect the business of the courts and to ensure that appropriate exemptions from access are included to address the role and functions of the judicial branch.

Invitation to comment ended on the same day as the meeting. Next steps include review of the public comments, revisions, and presentation to the council for approval.

Item 3 Revised Recommendations of the Education Working Group

Judge William J. Murray, Jr., working group lead, provided an update on the progress and recommendations of the committee's Educational Programming Working Group. He referred the committee to the document titled "Educational Programming Working Group – Revised Recommendations" (dated 09-28-09). He explained that the recommendations are organized into three categories: 1) educational content and programs; 2) explanation of legal terminology; and 3) additional online training materials for court staff.

1. Educational Content and Programs

Judge Murray referred the committee to Recommendation 1, which addresses the development of educational programs for the bench, bar, media, court staff, and public. The working group recommends that the main vehicle for education be ongoing regional academies. Faculty could be comprised of judges, court staff, attorneys, and journalists within the region.

Members remarked that there is an abundance of misinformation about the judicial branch.

Working group members noted changes in the media. Experienced reporters are being replaced by those with little experience. Bloggers and other citizen journalists are becoming increasingly more active. As a result, the judicial branch has a greater responsibility to educate the media and provide support for local bench-bar-media committees.

In Recommendation 2, the working group proposes training for judges and justices on how to present clearly the meaning or substance of court decisions. Members noted that the state Supreme Court clearly summarizes opinions. Members involved with the Judicial Council's Commission for Impartial Courts reported that the commission has also made this recommendation. Members agreed that concise summaries containing the facts of the case, key legal issues, and the rationale underlying the court's decision would serve as opportunities for judges and justices to educate the public about the judicial branch and a particular case.

No changes were made to either Recommendation 1 or 2 in the Educational Content and Programs section of the document.

2. Explanation of Legal Terminology

Judge Murray directed the members' attention to Recommendation 3, which read:

Encourage trial courts to post glossaries or explanations of legal terminology to their Web sites for the benefit of the media and broad public.

It was noted that the California Courts Self-Help Web page contains a valuable glossary of legal terms. (This glossary is located at <http://www.courtinfo.ca.gov/selfhelp/glossary.htm>.) Many courts have posted glossaries, such as the Superior Court of Los Angeles County (http://www.lasuperiorcourt.org/courtnews/Uploads/14200972484357MediaGlossary-pdf_Layout1.pdf). A committee member proposed that the recommendation state that glossaries be provided in multiple languages. The committee agreed and the recommendation was revised as follows:

Encourage trial courts to post glossaries or explanations of legal terminology in multiple languages to their Web sites for the benefit of the media and broad public.

3. Additional Online Training Materials for Court Staff

Members discussed Recommendation 4, which read:

Post media-related training materials for the courts on a secure internal online site, such as Serranus.

Judge Murray explained that the information would serve as a toolbox for many courts lacking available funds for training. Members did not see the necessity of posting the materials on a secure internal online site, as none of the information would be confidential. One member added that the materials should be multilingual. The recommendation was revised as follows:

Post media-related training materials for the courts ~~on a secure internal online site, such as Serranus.~~ As a secondary goal, provide the materials in multiple languages.

Media Hotline

Judge Murray explained that the working group had developed a recommendation to establish a hotline for media to ask questions and receive explanations of fundamental legal or procedural questions. However, the working group concluded that this recommendation should be withdrawn because staffing was not feasible and because the media wants to speak directly to someone at the court regarding the matter at hand.

Sealed Records Checklist

The working group also considered a recommendation to develop a checklist of factors a judge would consider when faced with a request to seal a record. The members concluded that the subject was too complex for a checklist of factors. A more comprehensive approach is to provide judicial training.

High-Profile Case Planning Checklist

Judge Murray also stated that a document providing guidelines or a checklist of issues for judges and staff handling high-profile trials is in development by the AOC. AOC staff has initiated discussions with court public information officers and other court representatives to begin a draft of this checklist.

Item 4 Revised Recommendations of the Conflict Resolution Working Group

Working group lead, Justice Judith McConnell, provided an overview of the recommendations of the Conflict Resolution Working Group. She referred the committee to the document titled “Conflict Resolution Working Group – Draft Recommendations (dated 10-20-09).

1. Regional Public Information Officers (PIOs)

The committee discussed Recommendation 1, which proposed the creation of three regional PIO positions. It was explained that trained PIOs employed by the AOC in each of the three regional offices could provide specialized assistance to those courts that need it. Members acknowledged the current budget constraints, yet agreed to go on record with a recommendation. A member proposed that the PIOs be multilingual if possible. The committee agreed and modified the recommendation as follows:

At such time when funds are available, ~~consideration should be given to creating and funding~~ create and fund three public information officer positions, with one position assigned to each AOC regional office. The primary responsibilities of the three regional PIOs would include assisting local superior courts with the following: 1) coordination of media activities in high-profile cases; 2) response to other complex media situations; and 3) community outreach efforts and general media relations. A desired qualification would be bilingualism or multilingualism.

2. Media Access Plan

Justice McConnell explained that Recommendation 2, the Media Access Plan, was modeled after the effective Washington Fire Brigade. It is intended that this plan be helpful in resolving conflicts between fair trial concerns and public access to the judicial process. Justice McConnell explained that the draft plan proposes establishing access teams in seven media market regions.

Significant discussion and opinions followed. The members discussed various unfortunate court-media scenarios (e.g., Superior Court of Yolo County) where a PIO or access team could have mitigated the situation. Staff reported that the Superior Court of Yolo County formed a bench-bar-media committee after an incident in which court security personnel denied the press entrance to a proceeding for a case that had garnered much attention locally. Members acknowledged that if a court does not employ a PIO, the access team and media access plan would be valuable resources. Justice McConnell explained that the access teams would be localized and proactive. The situations they would encounter are fluid and the team would have to be nimble. Some members stressed support for the access teams being made up of local judges, PIOs or other court staff, and media. These members stated it was critical for the teams to know first-hand the local media market. Others in support stated that a judge presiding over a case is more likely to trust the guidance of local judges.

Others disagreed and expressed skepticism as to whether seven regional access teams would actually work. Members questioned whether the teams would be capable of developing and maintaining expertise with continuously changing membership. Some members advocated that rather than creating seven regional teams, the committee should propose establishing one centralized team for the state. One media member noted that local courts often only allow their local press into proceedings, and he, therefore, does not support the regional team structure. Concerns were expressed that the regional structure would make courts that are considered insular even more so.

Others noted that it is not always possible to convene all parties to discuss the access issue (e.g., an arrest on Friday followed by an arraignment on Monday). Only in some proceedings (e.g., preliminary hearing or trial) is there adequate time to convene the team.

There were also concerns regarding the ethics of ex parte conversations involving the judge presiding over the case. One member stated that if there are any discussions between the

sitting judge and anyone else --even if they are not on the substantive issues of the case-- the attorneys should be present. Another member noted that it is critically important for the court's presiding judge, the sitting judge, the court's PIO, and the press to discuss logistical issues so that the case proceeds smoothly. Another member stated that while it would be ideal to involve all stakeholders, he is concerned with keeping this process simple and able to address media concerns quickly. He further stated that it would be critical to have a judge, sensitive to and knowledgeable of ex parte issues, responsible for conversations with the sitting judge. It was also stated that, ideally, the sitting judge would hold such conversations with participants in open court.

ACTIONS:

- 1. The working group will consider a viable approach for media access to the courts to include use of local resources, regional PIOs (when and if positions are created), and maintenance of a list of judges with high-profile case experience.*
- 2. The working group will discuss the concerns regarding ethics with representatives of the state Supreme Court's ethics committee or the California Judges Association (CJA).*

Item 5 Revised Recommendations of the Access to Court Proceedings Working Group

Mr. Ralph Alldredge, working group lead, referred the committee members to the document titled "Access to Court Proceedings Working Group – Revised Recommendations (dated 10-19-09)". He stated that the working group focused on developing general principles regarding access, rather than drafting rule language.

1. Sealing Orders

Regarding Recommendation 1, Mr. Alldredge stated that existing court rules (California Rule of Court 2.550 et seq.) adequately set forth the general principle that all court filings except those required to be kept confidential by law are presumed to be public documents and that any order sealing such court documents must be based upon a specific finding that some other legitimate interest is sufficient to override the fundamental right of public access. Those rules also properly permit any member of the public or the media to challenge a proposed or existing sealing order. However, the public and the media are often unaware that a sealing order is being sought or entered. In addition, the costs and complexities of presenting a challenge may discourage such activity even when notice is present.

In response to the facilitator's question, media members said the problem is pervasive. They said some judges routinely seal documents without weighing any factors. Another member noted that there is no sanction for judges who violate the rule.

Another complication was shared. According to some members, the automatic sealing of subsequent records in a case is often not valid. Mr. Patrick O'Donnell conveyed that he had worked on the development of Rule of Court 2.550 and that the rule does not apply to

discovery motions and records filed or lodged in connection with discovery motions or proceedings. However, the rule does apply to discovery materials that are used at trial or submitted as a basis for adjudication of matters other than discovery motions or proceedings. Members stated that it might be time to revisit the rule to require that the moving party explicitly set forth its reasons to seal. Mr. O'Donnell pointed out that Rule 2.551(b)(1) already states that the "motion or application must be accompanied by a memorandum and a declaration containing facts sufficient to justify the sealing." Members concluded that the rules are comprehensive and well-written, and that the issue seems to be compliance with the rule, which could be addressed by judicial education.

Regarding the provision in the recommendation that would require courts to post notice of applications for or entry of record sealing orders on their Web sites within 5 days, some members expressed concerns regarding increasing court staff workload. Other court members disagreed and stated this could be done within 5 days. The media members stated that they would need lists that simply included the cases' names and numbers.

Recommendation 1 was amended as follows:

- 1. Adopt a A rule requiring all courts to post notice of any application for or entry of a record sealing order on their local Web site within 5 days after filing or entry and to send such notice as well to the Judicial Council for publication on its Web site;*
- 2. Provide judicial education regarding the proper process for determining when a record should be sealed as set forth in Rules 2.550 et seq.*
- ~~32.~~ Seek §statutory authorization specifically permitting the award of attorneys fees and costs to any party successfully challenging a sealing order or application for a sealing order, with such fees and costs to be paid by the party or parties seeking the order; and*
- ~~43.~~ Develop a A simple form developed by the Judicial Council which that will facilitate pro per challenges to sealing orders.*

A judicial member of the committee voiced the following minority opinion to the above recommendations:

Listing every case where there is an application or an order to seal records will deter that request because it will draw attention to the case. There is concern that such a requirement will create unnecessary work for the court, and result in increased numbers of motions to unseal records which either were sealed properly, or result in the unsealing of information in which the media/public really has no interest. The current CRC 2.550 is well-crafted and if followed, is appropriate. Every case where records were sealed should have a redacted copy of the document as well as a sealing order so that the media knows that something is missing from the file and can make the appropriate motion to unseal records. We also need better judicial education. We are a public courthouse and cannot seal records unless the criteria for sealing are satisfied. With respect to one-sided attorney's fees, private parties who have attained a sealing order for appropriate reasons (e.g., protecting the privacy of a minor) ought to have their attorney's fees fighting a motion to unseal those records compensated by the person bringing the motion, just as a person who

successfully unseals a record because the sealing was inappropriate ought to have attorney's fees compensated.

2. Gag Orders

Mr. Alldredge explained that gag orders which prevent the attorneys or parties in either civil or criminal proceedings from speaking with the media or in any public forum about certain aspects of a pending case are not covered by any statewide rule that ensures the right of the public to know is weighed against any alleged overriding interest.

The following recommendation (Recommendation 2) of the working group was discussed and modified as indicated:

Adopt a uniform statewide rule similar to ~~that~~ those governing sealing orders and consistent with the opinion in Hurvitz v. Hoefflin (2000) 84 Cal.App.4th 1232, which:

- 1. Requires specific findings of a legitimate competing interest that overrides the public right of access and justifies some form of gag order;*
- 2. Limits the scope of any gag order to the narrowest restraint necessary to protect the overriding interest ~~which~~ that has been identified;*
- 3. Provides a means for the public and the media to be notified and given an opportunity to challenge any gag order that may be proposed or entered; and*
- 4. Provides for public notice of any application for or entry of a gag order by posting on local court Web sites and forwarding to the Judicial Council in the same manner as recommended for applications or orders concerning the sealing of court records.*

The members shared that most gag orders are issued under “emergency” circumstances. The working group was asked to consider the issuance of provisional or temporary gag orders until a decision could be made to issue a permanent order. Working group members stated they would explore this subject, but that findings should be made even for temporary gag orders. A member also asked the committee to set forth a procedure in their recommendation that would cover the various stages (i.e., temporary gag order, notice, final decision).

ACTIONS:

- 1. The working group will consider amending this recommendation to allow for the issuance of provisional or temporary gag orders that balance legitimate privacy concerns and the right of the public to know.*
- 2. The working group will also discuss setting forth a procedure that addresses the major procedural stages a gag order could take (i.e., temporary gag order, notice, final decision).*

3. Use of Cameras and Other Recording Devices in the Courtroom

The committee discussed Recommendation 3, which follows:

Amend CRC 1.150 to acknowledge that the use of cameras and other recording devices should be permitted as a matter of course to uphold the right of public access, unless after giving the requesting party adequate notice and opportunity to be heard with respect to any objections to the use of such equipment in a given case, the court has made specific findings that a more compelling interest overrides the public interest and any restrictions placed upon the use of such equipment are no greater than necessary to protect that overriding interest.

In order to effectively implement this rule, the working group members also recommended that a copy of any order entered concerning the presence or use of cameras or other recording equipment in a courtroom be provided to court security personnel responsible for that courtroom.

Mr. Alldredge related that the Washington rule on cameras in the court favors openness and explicitly sets forth a presumption that cameras are permitted in the courtroom. He reported that GR 16 of the Washington State court rules of general application is an excellent model for an amended California rule, both in terms of its content and its history of successful application in Washington. Members voiced numerous reasons for similar openness in California. It was noted that current California Rule of Court 1.150 provides judges with broad discretion in deciding whether to allow the use of cameras or any other recording device during trials or other public court proceedings. However, many judges automatically disallow cameras in their courtrooms.

Media members asked how the proposed recommendation would assist the press when a judge prohibits the use of cameras in the courtroom. Other members responded that the presumption of openness contained in this proposed rule change would give the press and public grounds for appeal.

Some members expressed concern that judges would not have the same level of discretion in disallowing cameras if the presumption were changed. Other members responded that the current rule contains numerous factors a judge could use to deny the use of cameras and that these factors would not be deleted from the rule. In sum, they asserted, the judge would still maintain discretion in determining whether cameras are permissible. The proposed rule change would not take away the power of decision from a judge, but would instead require the judge to provide more clarity around a decision.

Some members stated there are often legitimate reasons to prohibit the use of cameras in the courts (e.g., intimidating witnesses). Others noted that many judges and some attorneys would not support the proposed rule. Some judges will say that the media does not always follow the current rules (e.g., filming the public) and should, therefore, not be given more latitude in using cameras. Judicial members noted that if the press wants to give judges a comfort level, it will need to follow the current rules more often. The working group was asked to consider teasing out those proceedings where cameras should and should not be allowed.

No changes were made to Recommendation 3.

Justice Moreno conveyed that any member's opposition to this recommendation could be reflected in the committee's draft and final reports.

The following minority opinion was submitted by one judicial member of the committee:

Changing the presumption that cameras should be allowed is a sea change. The group's sense that it is a change in a word and leaves the court with the same discretion to forbid cameras reflects a lack of knowledge of the meaning of a presumption. There is substantial opposition to live cameras in the courtroom from the judiciary and the defense bar particularly. Well-known defense attorneys, who had the rare opportunity to participate in a well-publicized trial with camera coverage, are dead set against it, saying the camera coverage completely changed the nature of proceedings. While there may be very good reasons to allow coverage (it definitely provides greater access to the public), the committee needs to hear from those with the experience and get a true picture of the impact of camera coverage of a trial, before we change this presumption. There is room for changing the rule when it comes to other proceedings, including motions, arraignments, etc. and to allow greater "still" camera coverage.

4. Reducing the Cost of Trial Transcripts for the Media

Mr. Alldredge explained that matters relative to court reporters transcripts are highly political. He suggested that the wiser course of action would be for media groups to engage directly with court reporters rather than create a court rule imposing an obligation on court reporters. He proposed the following:

The Access to Court Proceedings Working Group has concluded that representatives of the California Newspaper Publishers Association and other media should meet with representatives of the court reporters and attempt to develop a special protocol and pricing formula which could provide court reporters with opportunities for additional income without jeopardizing their current right to compensation from the parties for preparing transcripts, while also giving the media an opportunity to obtain limited partial transcripts at a reasonable cost to assist them in preparing accurate accounts of court proceedings for publication. If those representatives meet and are able to reach agreement upon a modification of the current system that requires some change in court rules, they should make an appropriate joint recommendation to the judicial branch and/or the legislature.

The committee supported this statement.

5. Increasing Access to Juvenile Court Proceedings

Mr. Alldredge related that the working group members believe there may be important issues concerning access to juvenile court proceedings, but none of the members had sufficient expertise in this specialized area of practice to have confidence that they could identify specific issues to be addressed.

ACTION: Lawyers, media representatives and judges with special expertise in this area (such as members of the California Juvenile Court Judges Association) should be consulted and asked to identify any access issues that should be addressed by this working group or the Bench-Bar-Media Committee as a whole.

Item 6 Other Matters

Designing Courthouses

Ms. Leanne Kozak (AOC Office of Communications) said that the AOC Office of Court Construction and Management (OCCM) is in the process of designing new courthouses. Ms. Kozak stated she would meet with OCCM staff to raise awareness about media needs.

Implementation Group

Judge Murray proposed that the committee discuss how the recommendations from this committee will be implemented once the council approves them. Members discussed the importance of the key stakeholders – the bench, bar, and media – having the opportunity to shape initiatives stemming from the recommendations. Members suggested that the California Judges Association, AOC’s Education Division, and various media groups be included in the implementation process.

ACTION: Staff will add to the next Bench-Bar-Media Committee agenda the subject of a possible recommendation concerning the development of an advisory group to implement the approved recommendations of this committee.

Item 7 Committee Report Process – Development, Public Comment, and Revision

Justice Moreno explained that because the committee is closer to finalizing its recommendations, staff will begin to draft the final report that will eventually be submitted to the Judicial Council for consideration. At the next meeting in the spring of 2010, the draft report will be discussed and ultimately, following committee approval, it will be posted online for public comment. The committee will have opportunities to consider the public’s comments and any resulting revisions to the draft report. After the committee has approved a final version, the chair and staff will present the final report to the council. If the council approves any recommendations that affect the Rules of Court, these recommendations will then go through the council’s rule-making process. This process involves the council’s internal Rules and Projects Committee and possibly other council committees.

Item 8 Updated Timeline and Next Meetings

Staff referred members to the document titled “Timeline” (dated 10-23-09) and discussed possible dates for the next committee meeting. Mr. Peter Allen stated staff would contact the members by e-mail to determine their availability for a meeting next spring.

Item 9 Adjournment

Justice Moreno thanked the members for their participation and Justice Perren for his facilitation of the working group discussions. The meeting adjourned at 2:00 p.m.