2007 Report on Activities

Bench-Bar-Press Liaison Committee (Fire Brigade)

The Fire Brigade in 2007 once again dealt with the quick and the dead. On some occasions, a lively issue called out for timely Fire Brigade action and we tried to be quick; on others, the Brigade arrived to find an issue that was no longer breathing but that invited some poking and probing at its remains.

As in recent years, the mainstays of the Fire Brigade's work were the chronic issues of courtroom photography and access to court files and court proceedings. Depending on the timing of the Brigade's involvement, its role has been either to give quick advice or to perform a more leisurely autopsy. Remedial interventions are satisfying, of course, but we must remember that, in the long run, the educational effect of the autopsies can bring about prevention worth many times its weight in cure. (NOTE: Please be assured that there is no proposal to amend the Brigade's charter metaphor to a new one involving an aid car occupied by an EMT/pathologist. The undersigned is just giving the old, overworked metaphor a chance to cool off.)

One noteworthy trend in 2007 has been the increasing frequency of judges and working press sitting down together for a productive discussion at the outset of a high profile case. At such conferences, reporters are reminded of the court's specific concerns about protecting the fairness and dignity of the court process – especially through insulating the jurors – while the judge is reminded of the specifics of the press' needs for access to timely and complete information. Having all the mutual concerns openly laid out aids in the establishment of guidelines that are both workable for all and supportable by all. (The Brigade would like to give a special tip of the hat to the efforts of Judge Linda Lee of Pierce County and Judge David Frazier of Whitman County in this regard.)

Some of the previously anticipated cutting edge issues made appearances this year, though not in any life-or-death way. In a case of significant commercial importance, one judge carefully weighed (and then granted) a videotaping request by an organ of non-traditional media – a website. And, in the retrial of a politically charged case following a mistrial occasioned by out-of-court contact with jurors, another judge had to give consideration to empanelling an anonymous jury.

For historical purposes, it may be noted that Fire Brigade calls came in from representatives of the Everett Herald, Seattle Post-Intelligencer, Seattle Times, Spokane Spokesman-Review, KING, KIRO, KOMO and Allied Daily Newspapers as well as a number of judges. Geographically, the issues were spread over Benton, Chelan, Columbia, King, Pierce, Snohomish, Thurston and Whitman Counties.

Cameras in Court

Courtroom photography issues ran according to form this year, with the cases falling crisply into the quick and dead categories.

In one quick case, a King County judge used admirably clear reasoning in allowing photos of the defendant at a trial in which the ID by a child witness was a central issue. Since there were already photos of the defendant in the public domain, the judge reasoned that the most sensible approach (and, in First Amendment terms, the 'less restrictive alternative') was to have the prosecutor and the child's family insulate the child from any exposure to trial publicity.

Here's a typical autopsy case. It followed the exclusion of cameras at a politician's DUI hearing in District Court: "Judge X relates that at five past the appointed hour he was sitting in chambers waiting to be buzzed into the courtroom when the clerk stuck her head in the door and said 'Oh, by the way, there's a photographer here who wants to take pictures.' As many other judges have done before and will again, he made the quick (albeit wrong) call that, rather than talk to the lawyers, parties, media, etc. about what to him was a distracting side issue, he would simply say 'Tell 'em no.' and get on with the business of the court."

As usual, the Brigade's practical advice to the judge was to make the time that GR 16 requires; its philosophical advice was to view enhancement of an informed public as also a part of the business of the court. To the press, the advice was that the best practice remains to send a polite note or message to the court in advance of the proceeding. (24 hours is ideal.) The message should convey the intention to send a photographer to the proceeding and the expectation that all the provisions of the ***new*** General Rule 16 will be followed, including the presumption of access and the opportunity to be heard if necessary. Calling the rule ***new*** may offend a strict sense of accuracy but is a tactically sound attention-getter.

Access

Newer than GR 16 is the amended GR 15. The word of this one has gotten around quickly and the practice of completely sealing a court file has all but died out. As to individual filed documents, compliance with the clear guidelines of the new rule has left far fewer unanswered questions coming to the Fire Brigade's attention. A couple notable issues do remain.

Very much to its credit, the press has continued to press for the opening of old court files that were improperly sealed in former times. The Brigade has tried

to give some aid in this worthy effort. In most counties where these issues have been raised, the courts have been quite diligent about taking on primary responsibility. In the one large county that has declined to do so, at least the individual judges have responded well to the motions brought in individual cases.

A recurrent problem in the District Courts has historical roots. Many of these courts have long maintained a single court file in which is held both documents that have been relied upon by the court and also the paperwork the prosecutor *will* need if and when the case comes on for trial. With electronic recordkeeping replacing the old system of file folders, some public access stations show documents that seem to be in the record but that can't be accessed. This leads to understandable frustration as there's the appearance of a sealed court document when, in fact, the document has not yet become a part of the court record. It is hoped that this situation will soon be cured.

Proactive Measures

In February, a representative of the Fire Brigade once again spoke about its function at the statewide orientation program for all new Washington judges.

In addition, the undersigned was honored to give the keynote talk at the organizational meeting of the fledgling California Bench-Bar-Media Committee. That body (from whom we will no doubt learn a lot in years to come) was interested in learning about the history of our respected Washington Bench-Bar-Press Committee and specifically about the efforts of its Fire Brigade. The attached one page appendix -- excerpted from the comments made in San Francisco -- may not be dead-on accurate but should be of quick general interest.

Respectfully submitted,

William L. Downing

William L. Downing, Chair

Because it's interesting and because I spent a couple hours squatting in my storage closet to gather this, I want to share with you the topics of our BBP educational programs at our annual meetings in recent years:

2006: We examined the national trend toward empanelling anonymous juries in cases now reaching far beyond the organized crime prosecutions in which the practice arose. Then we took the philosophical and practical concerns that were raised (e.g., the accountability of the jury process and individual jurors' peace of mind) and applied them to routine procedures like background checks, sensitive voir dire questioning and the use of so-called confidential juror questionnaires.

2005: Representatives from the National Center for the Courts and the Media led us in a sensitivity session in which judges and reporters played role reversal. (Our Chief Justice wrote and delivered a memorable TV commentary lambasting a "pat-a-cake judge" who had handed down "another marshmallow sentence".)

2004: A debate on the upcoming implementation of GR 31 addressing online, remote access to court files. (The question at the center of the debate: should a citizen be required to put on their clothes and go down to the Courthouse in order to look at the public court file in their neighbor's divorce case? If so, why?)

2003: Responding to unjust criticism of judges. Our Supreme Court had recently reversed all felony murder convictions based on an assault theory and declared that the current laws did not prohibit "upskirt photography". These rulings made this topic topical! A panel discussed what could / should be done by bar leaders, presiding judges, PIO's, etc. when coverage tended to go beyond legal analysis and suggest a judicial preference for killers and voyeurs over victims.

2002: Access to court proceedings. The Moussaoui and Enron cases were heating up and, although we hoped never to see anything like either in Washington, we thought it would be good to look at how they might be handled under our rules and procedures.

2001: A debate on whether the Committee should adopt "Principles & Considerations" for the reporting of civil cases like those we have for criminal cases. This issue was raised by a state agency head who had a legitimate concern about lawyers' efforts to spin -- and a responsive media's willingness to sensationalize -- claims brought against the state. Our answer was ultimately "no" but it came after a healthy philosophical discussion.

2000: A historical look back at 25 years of cameras in Washington courts and a look at where we stood then and what we'd like to see in the future. This provided the context for the proposals for our revisions to the cameras-in-court rule that were adopted a few years later.

APPENDIX-1