2011 Report on Activities

Bench-Bar-Press Liaison Committee (Fire Brigade)

For this the 13th annual report to be filed by the undersigned, one is tempted to ask the new journalistic question: "What stories are trending?" The answer is those that arise in unusual types of proceedings.

During the past 12 months, continuing their wane were problems involving courtroom photography and access in criminal cases. This even included preliminary appearances and arraignments; whether this reflects a true reduction in conflict in this difficult context or simply the striking of a *détente cordiale* is not yet known.

What have been grabbing Brigade attention this year (*trending*, as we like to say) are familiar problems appearing in unusual contexts. These contexts include inquest proceedings, sexually violent predator cases and juvenile dependency hearings. So, although the Brigade did reach across the state this year to deal with the typical issues of access, cameras, "new media", journalist subpoenas and prior restraints, let's take a look at those unusual proceedings.

Inquest Proceedings

One of the recognized salutary purposes of a coroner's inquest is to get as much information as possible before the public. The judge handling a certain high profile Seattle inquest was quite mindful of this as he wrestled with what to do about video evidence that had been placed in the record but had not yet been formally presented. There was a risk that if witnesses were exposed to it before they appeared in court, their testimony could become tainted. The judge readily embraced the solution that the least restrictive approach was to allow full access for the press while he and the prosecutor admonished jurors and witnesses not to watch media coverage of the proceeding until it was concluded.

Sexually Violent Predator Cases

As in criminal cases, an indigent individual whose liberty is at stake has a right to seek publicly funded services and has a concurrent right to keep this a secret from the attorney on the other side. Consequently, such requests and authorizations are routinely filed under seal. Also like criminal cases, however, there comes a time when the rationale for that sealing is no longer compelling and must give way to the public's right to know how their money is being spent.

Although sealing orders that remain effective "until further order of the court", rather than having an identifiable termination date, are the main problem, others have surfaced as well. For one thing, the routinized processing of these

orders has tended to remove the exercise of judicial discretion from the important matter of sealing a public record. Consequently, 95% of what gets sealed contains nary a reference to case particulars but consists merely of boilerplate citation to the legal authority for the expenditure of funds and for the sealing.

The Brigade has worked this year with both the press and the court (a) to unseal documents where the justification has expired, and (b) to improve future practice in a way that properly balances the legitimate needs of the accused with the strong public interest.

Juvenile Dependency Hearings

In the Juvenile Court Act, RCW 13.34.115 (as enacted in 2003) provides: "All hearings shall be public except if the judge finds that excluding the public is in the best interests of the child." Unsurprisingly, a judge might tend to read this as a broad and practically unlimited grant of authority while a journalist might insist that the constitutionally required Ishikawa standards be met.

Two points must be noted. First, the Ishikawa ruling was limited to criminal cases, expressly distinguishing juvenile proceedings where the goal is "not to punish the child, but to inquire into his welfare and to provide an environment that will enable him to grow into a useful and happy citizen, where his parents have failed in that regard" and recognizing the interest in "protecting the child from notoriety and its ill effects." The second point, however, is that since Ishikawa and since the adoption of RCW 13.34.115, the Washington Supreme Court has ignored this distinction, most recently applying the more rigid constitutional standard to a mental illness commitment proceeding in July 2011.

It has been the Brigade's advice in this setting that the best practice is for the trial judge to hear from anyone present when a motion to exclude is made, to balance the competing public and private interests and to articulate particularized findings regarding the best interests of the child, essentially applying the Ishikawa guidelines even though that has not yet been held to be required.

Proactive Measures

In January, a representative of the Fire Brigade once again spoke about its function at the statewide orientation program for all new Washington judges. In addition, a Fire Brigade presentation was made at the District and Municipal Court Judges Association conference and another will be given at an upcoming program for Administrative Law Judges.

Respectfully submitted,

William L. Downing

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