

MINUTES

SUPREME COURT'S ADVISORY COMMITTEE ON THE UTAH RULES OF APPELLATE PROCEDURE

Administrative Office of the Courts
450 South State Street
Salt Lake City, Utah 84114

Judicial Council Room
Thursday, May 1, 2014
12:00 p.m. to 1:30 p.m.

PRESENT

Joan Watt – Chair
Alison Adams-Perlac – Staff
Troy Booher
Paul Burke
Marian Decker
Judge Gregory Orme
Rodney Parker
Bryan Pattison (by phone)
John Plimpton – Recording Secretary
Bridget Romano
Clark Sabey
Lori Seppi
Anne Marie Taliaferro
Judge Fred Voros
Mary Westby

EXCUSED

Alan Mouritsen
Tim Shea

1. Welcome and Approval of Minutes

Joan Watt

Ms. Watt welcomed the committee to the meeting. She asked for any comments on the minutes from the previous meeting. Ms. Seppi pointed out that, on page 2, “Judge’s Voros’s” should be changed to “Judge Voros’s.”

Ms. Seppi moved to approve the minutes from the April 10, 2014 meeting as amended. Ms. Taliaferro seconded the motion and it passed unanimously.

2. Discussion of Supreme Court Meeting and Rule 24

Joan Watt

Ms. Watt stated that that she ~~and~~ Ms. Adams-Perlac, ~~and Mr. Sabey~~ presented to the supreme court the proposed change to the 14,000 word limit in capital case briefs and the nature of the case shift. She stated that the court adopted the change to the 14,000-word limit in capital case

briefs, but it did not adopt the other changes because the court and committee are still considering how to revamp the structure of briefs to make them more helpful to the appellate courts and other elements of Rule 24 are still in flux.

Ms. Adams-Perlac stated that the changes to Rule 24 she included in the agenda were not all presented to the court, only the changes about the structure of the briefs were. She stated that the committee had already approved the changes not presented to the court, so they should be left alone. She stated that once the court decides how it would like briefs to be structured, Rule 24 would come back to the committee for approval and then be posted for public comment. She stated that once Rule 24 is finally approved with all of the changes, there will be a CLE or an article in the Utah Bar Journal on the changes. Ms. Watt stated that this way of amending Rule 24 is preferable to doing it piecemeal. Ms. Watt stated that Rule 24 should be tabled until the next meeting.

Ms. Romano stated that the changes made to Rule 24(a)(9) should reflect the supreme court's recent clarification on the marshaling requirement in *State v. Nielsen*. Ms. Adams-Perlac added that some of the justices said that having an introduction in briefs would be helpful. Ms. Watt stated that the justices were very positive about the committee trying to revise the rules to make briefs more accessible.

Rule 24 was tabled until the next meeting.

3. Rule 4(e)

Paul Burke

The committee departed from the agenda and discussed Rule 4(e) before Rules 23B and 38B. Mr. Burke stated that he was tasked with drafting revisions to Rule 4(e) in light of three considerations: (1) the committee's determination that the rule is currently backwards in dealing with timely versus untimely motions, (2) whether a motion for an extension of time to file a notice of appeal should be filed and decided on ex parte, and (3) the analogous federal rule. Mr. Burke proposed the following for Rule 4(e):

(e) Extension of time to appeal. The trial court, upon a showing of good cause, may extend the time for filing a notice of appeal upon motion filed before the expiration of the time prescribed by paragraphs (a) and (b) of this rule. A motion filed within 30 days after the expiration of the time prescribed by rule for filing notice of appeal may be granted by the trial court upon a showing of good cause or excusable neglect. Responses to motions for an extension of time are disfavored and the court may decide such a motion upon filing. No extension shall exceed 30 days past the prescribed time or 14 days beyond the date of entry of the order granting the motion, whichever occurs later.

Mr. Booher asked whether the Rule should only say that responses are disfavored if the motion is filed before the time period expires. Mr. Burke stated that would be a policy choice. Mr. Booher stated that a party might want to inform the court about case law on what constitutes excusable neglect or good cause for motions filed after the 30-day time period. Ms. Watt agreed with

Mr. Booher. Mr. Burke stated that if the committee adopts Mr. Booher's suggestion, the committee might want to consider breaking Rule 4(e) into subparts.

Mr. Burke stated that the current Rule provides 10 days for an untimely motion, but the federal rule provides 14 days and his revisions mirrored the federal rule for discussion purposes. Mr. Sabey stated that under the current Rules the practical result would be roughly the same, but it would be shorter if there was a holiday. He noted that the committee might want to change the time calculations in the Rules to match the civil rules.

Judge Voros stated that the first and second sentences convey parallel information but use nonparallel grammar. He suggested rewriting the sentences with parallel grammar. Mr. Burke stated that given the suggestions so far, he would propose breaking Rule 4(e) into two subparts, one dealing with motions filed prior to expiration and one dealing with motions filed after expiration.

Judge Voros asked whether "good cause or excusable neglect" ought to be "good cause and excusable neglect." Mr. Sabey stated that "excusable neglect" is a term of art that incorporates "good cause," it is similar to "good cause plus." Mr. Booher stated that usually the reason for requesting an extension is to decide whether appealing is worth the expense, and this will always constitute good cause. He proposed deleting "good cause" as a reason for granting a motion to extend after expiration. Ms. Watt asked whether the language "good cause or excusable neglect" has ever created an issue in the appellate courts. She expressed a preference for keeping that language.

The committee agreed that Rule 4(e) should be broken into subparts. Mr. Burke stated he would revise the proposal accordingly for the next meeting.

Mr. Burke will revise the proposal for Rule 4(e) for the committee's review at the next meeting.

4. Rule 38B

Joan Watt

The committee departed from the agenda and discussed Rule 38B before Rule 23B.

Judge Voros moved to approve Rule 38B as proposed. Ms. Westby seconded the motion, and it passed unanimously.

5. Rule 23B

Joan Watt

Ms. Watt stated that Rule 23B has been in subcommittee for about 2 years. She stated that a couple of years ago the committee voted to repeal Rule 23B as part of an appellate taskforce that was dealing with indigent representation. The committee had determined that Rule 23B was not benefitting defendants very much, it was difficult and time consuming, and it made it difficult to get lawyers to take on appeals for indigent criminal clients. Ms. Watt stated that the committee got pushback on its proposal to repeal it, so it formed a subcommittee to improve Rule 23B. Ms. Watt stated that the only member of the Rule 23B subcommittee who is not on the appellate committee is

Laura Dupaix, who is the chief of the criminal appellate division of the Attorney General's office (AG).

Ms. Watt stated that what the subcommittee came up with is a rule that keeps Rule 23B in place but that echoes language that is currently a standing order in both appellate courts. She stated that under the existing rule, a motion for remand under the Rule must be filed before the brief, but under the subcommittee's proposal the motion for remand must be filed with the brief unless there are extraordinary circumstances. Ms. Watt stated that having the motion filed with the brief has proven to be more workable.

Judge Orme stated that filing the motion with the brief has worked much better than filing the motion before filing the brief. Judge Voros stated that the proposed rule does a good job of making clear that an appellant cannot treat facts it hopes to show on remand as facts in its brief. Mr. Sabey stated that this is also an improvement over the current standing orders. Judge Voros stated that there is general agreement that the proposed rule is an improvement. Ms. Seppi also stated that the proposed rule is a great improvement, and submitting the motion with the brief should make it easier for the appellate courts. Judge Orme noted that it is also better for the appellant because it speeds up the resolution of the appeal. Ms. Decker stated that it is also better for the appellee. Judge Orme stated that the proposal is more efficient because it would allow the court to dispose of an unmeritorious ineffective assistance claim on the ground that the claim would fail even if the appellant could establish the proffered facts on remand. Ms. Seppi added to this, noting that the proposal would allow the court to reverse on grounds other than ineffective assistance, thereby rendering remand unnecessary.

Mr. Booher asked why an appellee would file a 23B motion for remand. Judge Voros stated the idea was not to foreclose the possibility that an appellee would file one. Ms. Westby stated that Laura Dupaix said the AG had filed one before, but that Ms. Westby had never seen it happen. Mr. Sabey said that Ms. Dupaix wanted a remand to bolster the State's case in responding to an ineffective assistance claim, which does not squarely fit the definition of a Rule 23B remand, so that definition would need to be changed. Mr. Booher suggested that it would be strange to remand for further factual findings to support the appellee's case on appeal after the opening brief is filed. He suggested that allowing for this would not be a good idea. He asked what the language "facts . . . that could support a determination that counsel was ineffective" in subsection (a) would be changed to. Judge Voros stated that the word "support" could be replaced with "effect," or that "or refute" could be added. Ms. Westby stated she could not conceive of a scenario in which an appellee would file a 23B motion, but that the reference to an appellee's motion could be removed, and in the rare circumstance that an appellee did want to file a 23B motion, it could do so under Rules 2 (Suspension of Rules) and 23B. Mr. Sabey stated that the AG was able to file a 23B motion when the Rules did not expressly provide for it. He said he is persuaded that an appellee's 23B motion would be a "once in a blue moon" event, and the Rules should only address more regular occurrences. Mr. Parker asked what the harm would be in allowing both parties to file a 23B motion.

Mr. Sabey stated that he was persuaded that there should be no specific reference to an appellee's motion, so long as the Rule does not prohibit such motions. Mr. Booher stated that he would not approve the proposal until he knew of circumstances in which the State would file a Rule

23B motion. The committee agreed to discuss with Ms. Dupaix the circumstances in which the AG filed a 23B motion.

Mr. Burke moved to table the Rule 23B proposal until the committee learned from Ms. Dupaix the circumstances in which the AG filed a 23B motion. Judge Orme seconded the motion and it passed unanimously.

6. Global Review of Rules

Troy Booher

The committee amended Rule 35 to read as follows:

Rule 35. Petition for rehearing.

(a) *Petition for rehearing permitted.* A rehearing will not be granted in the absence of a petition for rehearing. A petition for rehearing may be filed only in cases that have received plenary review and the court has issued as an opinion, memorandum decision, or per curiam decision. No other petitions for rehearing will be considered ~~regarding the denial of a petition for permission to appeal an interlocutory order, the denial of a petition for writ of certiorari, the denial of a motion for remand pursuant to rule 23B, or the grant or denial of any motion for summary disposition pursuant to rule 10.~~

(b) ~~*Time for filing; contents; answer; oral argument not permitted.*~~ A petition for rehearing may be filed with the clerk within 14 days after issuance of the opinion, memorandum decision, or per curiam decision ~~the entry of the decision~~ of the court, unless the time is shortened or enlarged by order.

(c) *Contents of petition.* The petition shall state with particularity the points of law or fact which the petitioner claims the court has overlooked or misapprehended and shall contain such argument in support of the petition as the petitioner desires. Counsel for petitioner must certify that the petition is presented in good faith and not for delay.

(d) *Oral argument.* Oral argument in support of the petition will not be permitted.

(e) *Response.* ~~No answer response~~ to a petition for rehearing will be received unless requested by the court. ~~The Any answer response to the petition for rehearing~~ shall be filed within 14 days after the entry of the order requesting the ~~answer response~~, unless otherwise ordered by the court. A petition for rehearing will not be granted in the absence of a request for a ~~response~~ answer.

(~~b~~f) ~~*Form of petition; length.*~~ The petition shall be in a form prescribed by Rule 27 and shall include a copy of the decision to which it is directed.

(~~g~~) ~~*Number of copies to be filed and served.*~~ An original and ~~six~~ 6 copies shall be filed with the court. Two copies shall be served on counsel for each party separately represented.

(h) *Length.* Except by order of the court, a petition for rehearing and any response requested by the court shall not exceed 15 pages.

(i) *Color of cover.* The cover of a petition for rehearing shall be tan; that of any response to a petition for rehearing filed by a party, white; and that of any response filed by an amicus curiae, green. All brief covers shall be of heavy cover stock. There shall be adequate contrast between the printing and the color of the cover.

(ej) *Action by court if granted.* If a petition for rehearing is granted, the court may make a final disposition of the cause without reargument, or may restore it to the calendar for reargument or resubmission, or may make such other orders as are deemed appropriate under the circumstances of the particular case.

(ek) *Untimely or consecutive petitions.* Petitions for rehearing that are not timely presented under this rule and consecutive petitions for rehearing will not be received by the clerk.

(el) *Amicus curiae.* An amicus curiae may not file a petition for rehearing but may file an answer-response to a petition if the court has requested an answer-response under subparagraph (ae) of this rule.

Mr. Burke moved to approve Rule 35 as amended. Mr. Sabey seconded the motion, and it passed unanimously.

Mr. Parker moved to approve Rule 47 as proposed. Mr. Booher seconded the motion, and it passed unanimously.

Mr. Parker stated that Rule 48(c) needs to clearly state that an ineffective petition for rehearing does not toll the time for filing a petition for a writ of certiorari.

Rule 48(c) was tabled until the next meeting.

The committee agreed that the language in Rule 48(e) should parallel the language in Rule 4(e). Mr. Burke stated that he would draft a revision to Rule 48(e) that parallels the Rule 4(e) proposal for the next meeting.

Mr. Burke moved to table Rule 48(e) until the next meeting. Judge Voros seconded the motion, and it passed unanimously.

7. Taskforce Update

Judge Fred Voros

There was no taskforce update.

8. Other Business

There was no other business discussed at the meeting.

9. Adjourn

The meeting was adjourned at 1:35 p.m. The next meeting will be held Wednesday, June 11, 2014.