

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
Wednesday, August 14, 2013
12:00 p.m. to 2:00 p.m.

PRESENT

Joan Watt – Chair
Judge Gregory Orme
Judge Fred Voros
Diane Abegglen
Alison Adams-Perlac
Troy Booher
Paul Burke
Marian Decker
Alan Mouritsen
Rodney Parker
Bryan Pattison (by phone)
Clark Sabey
Lori Seppi
Ann Marie Taliaferro
Mary Westby

EXCUSED

Bridget Romano

1. Welcome and Introduction of Members

Joan Watt

Ms. Watt welcomed the committee and introduced the new members of the committee, Alan Mouritsen and Rodney Parker. She thanked the other members for their continued service on the committee. She also introduced Alison Adams-Perlac, who is taking the place of Brent Johnson as staff to the committee.

2. Approval of Minutes

Joan Watt

Mr. Burke moved to approve the amendments from the June 16, 2013 meeting. Lori Seppi seconded the motion and it passed unanimously.

**3. Discussion of Rule 11-101(4) of the
Supreme Court Rules of Professional Practice**

Joan Watt

Ms. Watt discussed Rule 11-101(4) of the Supreme Court Rules of Professional Practice and addressed the changes to the rule providing that no lawyer may serve more than two consecutive terms on the committee unless appointed as chair or as an institutional or court representative. Judge Voros stated that the rule also requires members to disclose their legal practice at the first meeting of each year and at meetings when a new member first attends.

Committee members disclosed their legal practice. Ms. Decker stated that she works as an Assistant Attorney General in Criminal Appeals. Judge Orme stated his position on the Utah Court of Appeals. Mr. Mouritsen stated that he works as an Associate at Parsons Behle and Latimer and is working to create an appellate section there. Mr. Burke stated that he works at Ray Quinney Nebeker and his practice is focused on civil litigation. Mr. Booher stated that he works at the firm Zimmerman Jones and Booher and has an appellate practice. Ms. Seppi stated that she works at Salt Lake Legal Defenders Association. Mr. Parker stated that he works at Snow Christiansen and practices civil and appellate law. Ms. Taliaferro stated that she works at Brown Bradshaw and Moffitt and practices in the area of criminal appeals. Ms. Westby stated that she serves as staff attorney for the Utah Court of Appeals. Ms. Watt stated that she works at Salt Lake Legal Defenders Association and that her work focuses on appeals. Mr. Pattison stated that he works in civil litigation at Durham Jones and Pinegar. Mr. Sabey, Ms. Abegglen, and Ms. Romano were not present during the disclosures. She serves as the Appellate Court Administrator. Ms. Adams-Perlac serves as a staff attorney in the Administrative Office of the Courts.

**4. Public Comments to Proposed Changes on
Rules 4, 24, and 58**

Joan Watt

Ms. Watt discussed the public comments to the committee's proposed changes to Rule 24. Ms. Adams-Perlac reminded the committee that there were two proposed revisions of Rule 24 that went out for public comment separately. Version one proposed numerous changes to the rule, while version two was proposed by Judge Orme to address addendums to appellate briefs. She stated that both versions of the rule will be consolidated, so that they go up to the Supreme Court at one time.

Ms. Watt discussed the concerns of one commenter that the proposed rule does not cover each type of hearing that should have a private addendum. Mr. Booher suggested that they include the case types that are classified as private on Exchange. Ms. Adams-Perlac stated that juvenile court records are classified differently, and that juvenile court records in most cases are not public. Judge Orme suggested that the rule refer to the rules governing access to records in the Code of Judicial Administration. He stated that the Policy and Planning Committee is considering a similar rule.

Judge Orme moved that Ms. Adams-Perlac look at the proposed revisions to rule 24, and draft language to reference the Code of Judicial Administration as an alternative to delineating the types of cases that require a separately bound addendum. Ms. Decker seconded the motion and it passed unanimously.

Ms. Watt discussed public comments about the page limitations on Capital briefs. She discussed the concern of limiting the page length. Mr. Booher stated that the committee will be ignoring the Supreme Court's recommendation if it does not change the rule to require a page limit. Judge Voros stated that the new rule actually expands the page limit, making it twice as long. Mr. Booher stated that there is still a concern if the rule provides that Capital briefs have the same page limits as other kinds of briefs. Judge Orme stated that the committee only increased the word limit, but that the Utah Supreme

Court really wanted a page limit. He also stated that the rule still provides an opportunity to request permission to file an over-length brief. Judge Voros stated that the standard for an over-length brief is higher in the proposed rule than it was before. Ms. Watt stated that limiting the length does not comport with the ABA guidelines. She stated that this rule does not foreclose longer briefs, but a longer brief has to be justified. Judge Voros suggested that the committee keep the proposed rule as written, and include the public comments and the concerns the committee discussed that 100 pages may not be enough in the information it sends to the Supreme Court.

Mr. Booher moved to keep version 1 of Rule 24 as written, but to forward it to the Supreme Court with the public comments and the committee's concerns about the page limit. Ms. Decker seconded the motion and it passed unanimously.

Ms. Watt discussed a public comment concerned with the “nature of the case” language under (a)(5). Ms. Taliaferro suggested changing the language to “Introduction”. Ms. Watt suggested changing “one paragraph” to “concise” or “short”. Mr. Parker stated that the point of this subsection should be to use only a sentence or two to describe the case. Judge Orme suggested changing “one paragraph” to “succinct introduction”. Mr. Parker suggested putting an example “nature of the case” statement in a committee note. Mr. Burke suggested changing “one paragraph” to “succinct” or “concise”. Judge Voros suggested changing the language to “a concise statement of the nature of the case and the crux of the dispute,” and removing the rest of the sentence. Ms. Watt discussed adding something to the committee notes to help people understand what the committee means. Judge Voros suggested revising the rule as he stated, and having Judge Orme draft a committee note with an example. Mr. Pattison suggested adding that it should be done “without argument”.

Judge Voros moved to revise Rule 24(a)(5) at lines 18 and 19 as follows: “Nature of the case. ~~A one paragraph summary stating statement of the nature of the case, and the crux of the dispute, and the primary theme of the issues raised before the appellate court.~~” He also moved to add a committee note with an example by Judge Orme. Mr. Booher seconded the motion and it passed unanimously.

Mr. Sabey and Ms. Abegglen joined the meeting.

Ms. Watt discussed public comments to Rule 4(g). One comment asked what happens under the rule if the judge prepares the judgment under subsection (g)(iii). Ms. Watt stated that the committee’s intention was that the prevailing party draft the judgment.

Ms. Watt stated that since Rule 4(g) is based on rule 58A(d) of the Utah Rules of Civil Procedure she or Ms. Adams-Perlac will refer R. 58A(d) to the Civil Procedure Rules Committee to inquire who would serve the judgment if the court prepares it.

Mr. Booher stated that the committee is using URCP 58A for the timeline, but that under Rule 4(e), a motion is timely within 60 days. Ms. Seppi stated that the committee added “prompt” to avoid someone improperly delaying their motion. Judge Voros stated that both sets of rules should use the same language and that Rule 4(g) tracks URCP 58A. Ms. Watt stated that no one would consider 59 days as promptly served. Judge Voros stated that the bar is pretty high, requiring reasonable diligence, and that it be served promptly. Judge Voros suggested that the committee keep the language as written. Ms. Watt suggested changing the language to “prevailing party”, requiring the “prevailing party” to serve the judgment even if the court drafts it. Ms. Watt also stated that the benefits of Rule 4(g) will not apply if no party is responsible for service. Mr. Booher suggested adding “and no party has served”. Judge Voros suggested changing the language to state, “the party, if any”.

Judge Voros moved to add “if any” after “party” on line 56 of Rule 4(g)(iii), and to otherwise leave the rule as written with formatting changes based on the suggestions made in public comment. Mr. Booher seconded the motion, and it passed unanimously. The committee requested that Ms. Adams-Perlac add the new language, make formatting changes, and recirculate the proposed rule to the committee.

The committee discussed public comments to Rule 58. The committee requested that Ms. Adams-Perlac include a reference to the Code of Judicial Administration as with Rule 24, and recirculate the rule for the next meeting.

5. Rule 24(j)

Judge Fred Voros

Judge Voros discussed proposed changes to Rule 24(j). He stated that the changes are not meant to be substantive, but to make the rule clearer. Mr. Burke questioned whether the letter discussed in Rule 24(j) is actually a letter or a pleading. Judge Voros asked the committee if “letter” should be changed to “a notice”. Mr. Sabey noted that such a change may provoke parties to file a response to it. Mr. Burke suggested changing “letter” to “a notice”. Judge Voros discussed how Rule 24(j) allows parties to withdraw a devastating confession or to provide other important information. Mr. Sabey stated that expanding the rule would open the door to supplemental materials being filed. Ms. Watt stated that she prefers “letter”, because calling it “a notice” would expand what is filed. Mr. Parker noted that “letter” makes the most sense. Mr. Burke indicated his disagreement. Ms. Abegglen noted that “idenfity” on line 6 should be changed to “identify”.

Mr. Burke motioned to adopt the proposed change to Rule 24(j) with the change to line 6. Judge Voros seconded the motion, and it passed unanimously. The committee requested that Ms. Adams-Perlac make the requested changes and send it out for public comment.

6. Rule 9

Mary Westby

Ms. Westby discussed proposed changes to Rule 9. Mr. Booher suggested that the statement of the case be removed from (c)(3)(D). Mr. Parker suggested changing the language of (a) to “not include persuasive argument” to (c)(3)(D). Ms. Westby stated that the language should include “state at least one issue that is legally reviewable in the docketing statement” and to “not include argument” instead of “not a persuasive argument.” Judge Voros stated that the main purpose of a docketing statement is to determine whether the appellant filed a notice of appeal on time and whether there is something to consider on appeal. Mr. Parker stated that he likes the language of (c)(1)(A) with the example and suggested that a similar example be used for the committee note Judge Orme will draft for Rule 24. Mr. Mouritsen questioned why (c)(9) in the current version was deleted. Ms. Westby stated that she deleted (c)(9) because the Supreme Court sends out a letter addressing these issues. Mr. Sabey stated that he could ask the Supreme Court if they will formalize their procedure in the rules. Otherwise, Mr. Mourtsen will look at the rules to see if there is a better place to put Rule 9(c)(9). Judge Voros suggested that Rule 9 may benefit from more headings. Ms. Westby stated that she will try to add headings. Mr. Booher suggested a few changes including changing “establish” to “identify” in (a), citing to Rule 10 after “review” in (a), and deleting “is not a persuasive document” in (a). Mr. Booher also suggested inserting “petition for review of administrative order” throughout (c), and under “brief of appellant” inserting the name of the document so the section is consistent with other rules. He also asked the committee whether “final judgment” is necessary in Rule 14 cases. Mr. Booher also suggested taking out “annotated” based on the Supreme Court’s decision to cite only to the Utah Code.

Ms. Westby will make changes to the proposal and recirculate it to the committee. The committee will vote on the proposal by email.

7. Rule 5

Committee

The committee discussed tabling the discussion of Rule 5, particularly in light of the global review subcommittee which is also looking at this rule. Mr. Booher stated that he thought the committee agreed on proposed changes to Rule 5 at the last meeting. Ms. Watt asked if the proposal could be approved as to substance. Mr. Parker stated that the proposed changes make sense, but he suggested that “writing well” be removed. Ms. Watt agreed, expressing a concern that something could be denied if it is inelegantly written. Mr. Sabey stated that he should look at whether Rule 5(g) is consistent with his Rule 8A proposal.

Judge Voros moved to adopt the amendments in substance, without (b), subject to global changes and Mr. Sabey’s 8A proposal. Mr. Parker seconded the motion, and it passed unanimously.

8. Rule 23B Update

Joan Watt

Ms. Watt is participating on the Rule 23B subcommittee and she provided an update to the committee. She stated that the committee had recommended repeal of Rule 23B. The Rule 23B subcommittee is working in conjunction with the Habeas subcommittee, and recent United States Supreme Court decisions have impacted their discussions. The 23B subcommittee will be meeting again on September 24, 2013.

9. Rule 29

Clark Sabey

Mr. Sabey discussed developments with Rule 29. He stated that the Supreme Court approved the proposed rule with the committee’s recommendations and passed it on an emergency basis. He stated that the proposed rule is out for public comment now.

10. Rule 8A

Clark Sabey

This item was tabled for discussion at the next meeting.

11. Rule 44 (Committee Note)

Clark Sabey

This item was tabled for discussion at the next meeting.

12. Global Review of Rules Update

Troy Booher

This item was tabled for discussion at the next meeting.

13. Juvenile Record on Appeal Rule Changes

Judge Gregory Orme

This item was discussed during the Rule 24 discussion at item 4 above.

14. Other Business

Judge Orme expressed a concern about having multiple copies of the agenda item being printed and going to waste since many committee members print their own copy. The committee requested

that Ms. Adams-Perlac provide an electronic meeting packet in advance of each meeting, and each present member indicated that they would not need a hard copy of the materials. Ms. Adams-Perlac will bring 2-3 copies of the meeting packet to the meeting, but will not provide paper copies for every member. If she sends out an updated packet, she will note in the email which pages are different from the original packet.

The next meeting will be held on September 25, 2013 at 12:00 p.m. in the Judicial Council room.

15. Adjourn

The meeting was adjourned.