

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, April 10, 2014
12:00 p.m. to 1:30 p.m.

PRESENT

Joan Watt – Chair
Alison Adams-Perlac – Staff
Troy Booher
Marian Decker
Alan Mouritsen
Judge Gregory Orme
Rodney Parker
Bryan Pattison (by phone)
John Plimpton – Recording Secretary
Clark Sabey
Lori Seppi
Tim Shea
Judge Fred Voros
Mary Westby

EXCUSED

Paul Burke
Bridget Romano
Anne Marie Taliaferro

1. Welcome and Approval of Minutes

Joan Watt

Ms. Watt welcomed the committee to the meeting. Ms. Watt asked the committee for comments on the minutes of the previous meeting. Mr. Booher stated that all references to “*Bradbury*” should be changed to “applications of *Bradbury*” or “cases citing *Bradbury*.” Mr. Booher also stated that the word “stricken” on page 10 should be changed to “deemed inadequate.” The committee made a few other minor edits to the minutes. Judge Orme stated that it would enhance readability if there were a double-space between paragraphs. Mr. Plimpton said he would insert a double-space between paragraphs in the future.

Mr. Booher moved to approve the minutes from the March 6, 2014 meeting as amended. Ms. Decker seconded the motion and it passed unanimously.

2. Rule 38B

Joan Watt

Ms. Watt explained that Rule 38B was put on the agenda by mistake. Ms. Watt and Judge Voros explained that the proposed amendment to Rule 38B cross-references to rules in the Supreme Court Rules of Professional Practice that are anticipated to be but have not yet been passed by a task force. Judge Voros stated that, accordingly, it would be premature to approve Rule 38B. He stated that the supreme court could always adopt Rule 38B on an emergency basis if it needed to. Ms. Watt stated that Rule 38B needs to be tabled for the time being, but also monitored.

Mr. Sabey moved table Rule 38B and monitor the rules it will cross-reference. Ms. Seppi seconded the motion and it passed unanimously.

3. Classification of Records Rule

Alison Adams-Perlac

Ms. Adams-Perlac presented her revised proposal addressing classification of records. She stated that the proposal does not address extraordinary writs, elections, and things of that nature, because there is more information that she needs. She stated that she added headings, she put the “public nature of filings” at the beginning of the rule, organized the rule from least protected to most protected, and from least work for the court to the most work for the court. She said she added the reference to the Code of Judicial Administration in the advisory committee note. She said she added a subsection (f), which discusses when a party needs to file a motion to change the classification of a record.

Judge Voros stated that the word “anything” is not often used in the rules, and suggested that it should be avoided in this Rule. Mr. Sabey stated that subsection (a) should be amended to read, “All filings in the appellate court are public.” The committee agreed. Mr. Parker stated that subsection (b) should be amended to read, “The contents of the record on appeal have” The committee discussed other language in the Rule in depth, but could not settle on the proper wording.

Judge Voros proposed creating a subcommittee for editing the language of the Rule and ensuring that it is consistent with other statutes and rules. Ms. Watt asked which committee members would be willing to be on the proposed subcommittee. Ms. Adams-Perlac stated that she was not sure that a subcommittee would add anything. Mr. Parker stated he was inclined to second Judge Voros’s proposal to create a subcommittee. Ms. Watt again asked who would be on the subcommittee. She stated that the committee has the concept of the Rule, and the purpose of the subcommittee would only be to choose the language to best communicate the concept.

Judge Voros, Mr. Shea, Ms. Adams-Perlac, and Mr. Booher agreed to be on the subcommittee. Ms. Adams-Perlac agreed to chair the subcommittee.

Judge Voros moved to create a subcommittee to edit the language of the Classifications of Records Rule. Mr. Parker seconded the motion, and it passed unanimously.

Mr. Booher flagged the word “party” in subsection (f) for the subcommittee. He stated that the word “party” would exclude news organizations. Mr. Sabey stated that “party” could be replaced with “person.”

4. Rule 1(f)

Mary Westby

Ms. Westby presented her revised proposals to subsections (b) and (f) of Rule 1. The committee amended Rule 1 to read as follows:

Rule 1. Scope of rules.

(a) Applicability of rules. These rules govern the procedure before the Supreme Court and the Court of Appeals of Utah in all cases. Applicability of these rules to the review of decisions or orders of administrative agencies is governed by Rule 18. When these rules provide for a motion or application to be made in a trial court or an administrative agency, commission, or board, the procedure for making such motion or application shall be governed by the Utah Rules of Civil Procedure, Utah Rules of Criminal Procedure, and the rules of practice of the trial court, administrative agency, commission, or board.

(b) Reference to "court." Except as provided in Rule 43, when these rules refer to a decision or action by the court, the reference shall include a panel of the court. The term "trial court" means the court or administrative agency, commission, or board from which the appeal is taken or whose ruling is under review. The term "appellate court" means the court to which the appeal is taken.

(c) Procedure established by statute. If a procedure is provided by state statute as to the appeal or review of an order of an administrative agency, commission, board, or officer of the state which is inconsistent with one or more of these rules, the statute shall govern. In other respects, these rules shall apply to such appeals or reviews.

(d) Rules not to affect jurisdiction. These rules shall not be construed to extend or limit the jurisdiction of the Supreme Court or Court of Appeals as established by law.

(e) Title. These rules shall be known as the Utah Rules of Appellate Procedure and abbreviated Utah R. App. P.

(f) Rules for appeals in child welfare proceedings. Appeals taken from juvenile court orders related to abuse, neglect, dependency, termination, and adoption proceedings are governed by ~~Title VII~~ Rules 52 through 59, except for orders related to substantiation proceedings under Section 78-3a-320. Rules 9, ~~10~~ and 23B do not apply. Due to the summary nature of child welfare appeals, Rule 10(a)(2)(A) does not apply. ~~but the o~~ Other appellate rules apply if not inconsistent with Rules 52 through 59.

Ms. Westby moved to approve Rule 1 as amended. Judge Voros seconded the motion and it passed unanimously.

5. Rule 24 and *Broderick*

Committee

Ms. Watt stated that the committee members were supposed to decide whether to codify, disavow, or to leave the rules as they are. She stated that *Broderick* is pretty clear in limiting itself to the facts of that case. She further stated that the rules are clear that the briefing requirements applicable to appellants also apply to appellees. She stated that she believes the committee should do nothing about *Broderick*. Mr. Parker agreed, and questioned whether it was appropriate for the committee to second-guess a remedy crafted by the supreme court.

Mr. Booher expressed his concern that *Broderick* seems inconsistent with Rule 26(c), which provides that the penalty for an appellee who does not file a brief is that the appellee will not be heard at oral argument. He suggested that the rules do not give adequate notice of *Broderick* consequences. Ms. Watt pointed out that Rule 26(c) is not exhaustive—it provides only that an appellant may move to preclude an appellee who fails to file a brief from presenting oral argument. Mr. Booher stated that he does not see why the rules should not alert litigants to the possibility of *Broderick* consequences.

Mr. Parker suggested that, under the rules, failing to file a brief could result in *Broderick* consequences. Mr. Sabey agreed. Ms. Watt stated that the remedy in *Broderick* is akin to a summary reversal. Ms. Westby stated that *Broderick* created no new risk for filing an inadequate brief. Ms. Watt stated that, in *Broderick*, the supreme court needed to craft a remedy for appellee's inadequate brief but did not want to set precedent because, due to the inadequacy of appellee's brief, both sides of the issue had not been adequately argued to the court.

Judge Voros stated that *Broderick* is contrary to an axiom of appellate law: an appellate court will only reverse if the trial court committed legal error.

Mr. Parker stated that addressing *Broderick* in a rule would be inappropriate because it would tie the court's hands in the future. Judge Orme suggested mentioning *Broderick* in a committee note. Ms. Watt suggested that if the possibility of *Broderick* consequences warrants a committee note, so do the possible consequences for a failure to marshal the evidence and the possible consequences for other briefing failures that are not addressed in the rules. Mr. Parker pointed out that practitioners have access to the annotations, and *Broderick* will be mentioned in the annotations. Mr. Sabey said that *Broderick* seems to fit an annotation better than a committee note.

Judge Voros asked if anyone objected to a committee note. Mr. Parker objected on the basis that a committee note would enshrine *Broderick* and tie the court's hands for addressing *Broderick* in the future or letting *Broderick* fade away. Mr. Sabey agreed with Mr. Parker. Judge Orme stated that he is persuaded that there is a problem with mentioning *Broderick* in a committee note because it either would prevent *Broderick* from fading away or the committee would need to amend the committee note every time the courts address *Broderick*.

Mr. Parker moved to do nothing about Broderick indefinitely and "without prejudice." Ms. Decker seconded the motion and it passed unanimously.

Mr. Booher stated that the proposed amendments to Rule 25 were part of the “cleanup” of the language of the rules. Mr. Shea expressed dislike for the term “movant” and suggested that it should be replaced with “moving party.” Judge Orme pointed out that “moving party” seems to exclude nonparties.

The committee amended Rule 25 to read as follows:

Rule 25. Brief of an amicus curiae or guardian ad litem.

A brief of an amicus curiae or of a guardian ad litem representing a minor who is not a party to the appeal may be filed only by leave of court granted on motion or at the request of the court. The motion for leave may be accompanied by a proposed amicus brief, provided it complies with applicable rules and the number of copies specified by Rule 26(b) are submitted to the court. A motion for leave shall identify the interest of the ~~applicant~~ movant and shall state the reasons why a brief of an amicus curiae or the guardian ad litem is desirable. Except for a motion for leave to participate in support of, or in opposition to, a petition for writ of certiorari filed pursuant to Rule 50(f), ~~the~~ motion for leave shall be filed at least ~~twenty-one~~ 21 days prior to the date on which the brief of the party whose position as to affirmance or reversal the amicus curiae or guardian ad litem will support is due, unless the court for cause shown otherwise orders. Parties to the proceeding may indicate their support for, or opposition to, the motion. Any response of a party to a motion for leave shall be filed within ~~seven~~ 7 days of service of the motion. If leave is granted, an amicus curiae or guardian ad litem shall file its brief within ~~seven~~ 7 days of the time allowed the party whose position the amicus curiae or guardian ad litem will support, unless the order granting leave otherwise indicates. The time for responsive briefs under Rule 26(a) shall run from the timely service of the amicus or guardian ad litem brief or from the timely service of the brief of the party whose position the amicus curiae or guardian ad litem supports, whichever is later. A motion of an amicus curiae or guardian ad litem to participate in the oral argument will be granted when circumstances warrant in the court's discretion.

Mr. Parker moved to approve Rule 25 as amended. Mr. Mouritsen seconded the motion, and it passed unanimously.

The committee voted unanimously to change “which” to “that” in Rule 24(k).

The committee amended Rule 27 to read as follows:

Rule 27. Form of briefs, petitions for writ of certiorari and petitions for rehearing.

(a) Paper size; printing margins. Briefs, petitions for writ of certiorari and petitions for rehearing shall be typewritten, printed or prepared by photocopying or other

duplicating or copying process that will produce clear, black and permanent copies equally legible to printing, on opaque, unglazed paper 8 1/2 inches wide and 11 inches long, and shall be securely bound along the left margin. Paper may be recycled paper, with or without deinking. The printing must be double spaced, except for matter customarily single spaced and indented. Margins shall be at least one inch on the top, bottom and sides of each page. Page numbers may appear in the margins.

(b) *Typeface*. Either a proportionally spaced or monospaced typeface in a plain, roman style may be used. A proportionally spaced typeface must be 13-point or larger for both text and footnotes. A monospaced typeface may not contain more than ten characters per inch for both text and footnotes.

(c) *Binding*. Briefs, petitions for certiorari and petitions for rehearing shall be printed on both sides of the page, and bound with a compact-type binding so as not unduly to increase the thickness of the brief along the bound side. Coiled plastic and spiral-type bindings are not acceptable.

(d) *Color of cover*. The cover of the opening brief of appellant shall be blue; that of appellee, red; that of intervenor, guardian ad litem, or amicus curiae, green; that of any reply brief, or in cases involving a cross-appeal, the appellant's second brief, gray; that of any petition for rehearing, tan; that of any response to a petition for rehearing, white; that of a petition for certiorari, white; that of a response to a petition for certiorari, orange; and that of a reply to the response to a petition for certiorari, yellow. All covers shall be of heavy cover stock. There shall be adequate contrast between the printing and the color of the cover.

(e) *Contents of cover; ~~contents of cover~~*. The cover of all briefs, petitions for certiorari and petitions for rehearing shall set forth in the caption the full title given to the case in the court or agency from which the appeal was taken, as modified pursuant to Rule 3(g), as well as the designation of the parties both as they appeared in the lower court or agency and as they appear in the appeal. In addition, the covers shall contain: the name of the appellate court; the number of the case in the appellate court opposite the case title; the title of the document (e.g., Brief of Appellant); the nature of the proceeding in the appellate court (e.g., Appeal, Petition for Review); the name of the court and judge, agency or board below; and the names and addresses of counsel for the respective parties designated as attorney for appellant, petitioner, appellee, or respondent, as the case may be. The names of counsel for the party filing the document shall appear in the lower right and opposing counsel in the lower left of the cover. In criminal cases, the cover of the defendant's brief shall also indicate whether the defendant is presently incarcerated in connection with the case on appeal and if the brief is an Anders brief.

(f) *Effect of non-compliance with rules*. The clerk shall examine all briefs before filing. If they are not prepared in accordance with these rules, they will not be filed but shall be returned to be properly prepared. The clerk shall retain one copy of the non-complying brief and the party shall file a brief prepared in compliance with these rules within 5 days. The party whose brief has been rejected under this provision shall immediately notify the opposing party in writing of the lodging. The clerk may grant additional time for bringing a brief into compliance only under extraordinary circumstances. This rule is not intended to permit significant substantive changes in

briefs, petitions for certiorari or petitions for rehearing. This subsection does not apply to petitions for writ of certiorari or to petitions for rehearing.

Mr. Parker moved to approve Rule 27 as amended, subject to Ms. Adams-Perlac reviewing the Rule to ensure that the language is consistent throughout. Judge Orme seconded the motion and it passed unanimously.

7. Other Business

There was no other business discussed at the meeting.

8. Adjourn

The meeting was adjourned at 1:50 p.m. The next meeting will be held Thursday, May 1, 2014.