

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, January 4, 2018
12:00 p.m. to 1:30 p.m.

PRESENT

Troy Booher
Paul Burke- Chair
Lisa Collins
Cathy Dupont-Staff
R. Shawn Gunnarson
Alan Mouritsen
Judge Gregory Orme
Judge Jill Pohlman
Adam Pace – Recording Secretary
Rodney Parker
Bridget Romano
Clark Sabey
Nancy Sylvester-Staff
Mary Westby

EXCUSED

Christopher Ballard
Lori Seppi
Ann Marie Taliaferro

1. Welcome and approval of minutes

Paul Burke

Mr. Burke welcomed the committee to the meeting and introduced Cathy Dupont, the new Appellate Courts Administrator, who will be serving as a staff member on the committee. Mr. Burke then asked each of the committee members to disclose a brief summary of their practice area in accordance with Rule 11-101(4) of the Supreme Court Rules of Professional Practice. Each member present did so. Mr. Burke then invited a motion to approve the minutes from the last meeting.

Ms. Romano moved to approve the minutes from the November 2017 meeting. Mr. Gunnarson seconded the motion and it passed unanimously.

2. Subcommittee on challenging the constitutionality of a statute: Civil Rule 24, Appellate Rule 25A, Criminal Rule 12(i) (pending)

Nancy Sylvester

Ms. Sylvester explained that a new subcommittee is being formed to match the language, where appropriate, between Civil Rule 24, Appellate Rule 25A, and Criminal rule 12(i) with respect to challenging the constitutionality of a statute. Mr. Burke asked for another volunteer to serve on the subcommittee with Ms. Romano. Mr. Parker volunteered. The committee will wait to hear back from the subcommittee before taking further action on this issue.

**3. Reducing brief word to page ration; briefing attorney fees.
Rules 24 and 24A and Form 8**

Cathy Dupont

Ms. Dupont introduced a request from the Supreme Court and Court of Appeals to amend Rules 24(g)(i) and 24(A)(g)(i) in order to: (1) adjust the words to page ratio in briefs submitted to the court; and (2) provide greater clarity in the briefs when a party is making a request for attorney fees.

Judge Orme commented that some federal courts have reduced their word limits for briefs and that, based on a conversation he had with Justice Lee, the Supreme Court thinks a reduction is warranted because briefs have gotten longer on average since the new page/word limits were introduced in Rule 24.

Ms. Romano said that when the Tenth Circuit changed to a word limit instead of pages, her appellate briefs became longer on average because she adjusted the typography to make them easier to read. She prefers a strict word limit, with no page limit.

Mr. Booher said that a word limit reduction may make sense for briefs filed to the Court of Appeals, which are generally focused on explaining what the law is in Utah, but that it could create problems for briefs submitted to the Supreme Court that sometimes require extensive briefing on policy issues, legislative history, or 50 state surveys of the law in other states. He thinks it is very strange for the Supreme Court to request a word limit reduction. Mr. Booher also expressed concern about reducing the word-limit because it is very difficult for practitioners to get permission from the court to file an over-length brief.

Ms. Romano expressed concern that reducing the word limit will lead to additional requests from the Supreme Court for supplemental briefing. She said that the number of these requests her office receives has increased dramatically, which imposes a significant burden.

Mr. Booher suggested that if the committee is going to recommend a reduction in the word limit, it should try it first in the Court of Appeals to see how it goes, and that it should also make it easier for parties to request permission to file an over-length brief when needed. He suggested creating a presumptive amount of additional words that would be allowed based on a certification of counsel that they are necessary, without having to meet the current requirements to file an over-length brief.

Judge Orme said that the request for the reduction came from the Supreme Court, and that while the Court of Appeals does not oppose it, it is not jointly making the request. In light of this, he

asked (rhetorically) how the Supreme Court would react if the committee's recommendation is to reduce the word limit only in the Court of Appeals.

Mr. Burke asked what percentage of briefs would be impacted by the proposed reduction. Ms. Collins said it would impact a very high percentage of briefs filed in the Court of Appeals. Mr. Sabey and Ms. Collins offered to research the question further.

Mr. Burke asked if any other states have adopted different word limits for their intermediate and supreme courts. He said it would be helpful to know how other states have addressed this issue.

Ms. Romano commented that although Ms. Seppi and Taliaferro are not present, she is certain that they would object to the proposed word-limit reduction for death sentence issues. Mr. Booher said that reducing the word-limit for death sentence cases is a terrible idea because practitioners are required to brief every issue in their appeal of right in order to preserve the issue for a future habeas petition.

Mr. Burke asked if the court had a particular reason for proposing the reduction to the death-sentence cases. Mr. Sabey said that he was not aware of one, and that it is just a proportional reduction. Mr. Burke said that he would like input on this issue at the next meeting from the absent committee members who practice criminal defense.

Mr. Burke asked the committee to consider the proposed change to the attorney fee provision in Rule 24(a)(9). He suggested changing the language in lines 31-34 to require citations to the record, in addition to reasoned analysis supported by legal authority. Mr. Sabey said that a citation to the record may not be necessary or appropriate in all requests for attorney fees. Mr. Gunnarson suggested the following language: "A party seeking attorney fees for work performed on appeal must state the request explicitly, in a separate section of the brief, and explain, with reasoned analysis supported by legal authority and applicable record citations, why the party should be awarded attorney fees."

Mr. Burke suggested tabling the discussion until next month to give the absent committee members an opportunity to comment. He asked Ms. Collins to research the percentage of briefs that the proposed change will impact. Ms. Romano offered to research the briefing word limits for intermediate and supreme courts in other states.

4. Expediting adoption appeals. Rules 1, 52, 53, 54, 55, 56, 57, 58, 59 Judge Orme

Judge Orme led a continued discussion of the proposal to amend the Appellate Rules to expedite adoption appeals. Ms. Collins reported that she received feedback on the proposed rule changes from the Juvenile Rules Committee's staff person, Katie Gregory, who did not recommend any changes. Since the committee's last discussion of this issue in September, the court has implemented an internal program to set oral argument dates for child welfare cases when the briefing schedule is set, and to set expedited issuance of opinions after oral argument. The court would like to change the program to include adoption cases as well. Ms. Westby and others agreed that when these changes are made it will be very important to educate family law practitioners about them.

Mr. Booher asked if Appellate Rule 4(e) should apply for extensions for these expedited appeals. Ms. Westby suggested putting language in Rule 4 stating that adoption appeals are governed by Rule 52. Mr. Sabey agreed with this suggestion.

Judge Orme said that he will present a specific proposal of the changes at the next meeting, and will update the committee on a plan devised by Judge Harris to involve the district court in educating practitioners and parties about the changes.

5. Discussion: Rescheduling May meeting

Paul Burke

Mr. Burke asked to reschedule the May meeting to May 10th to avoid a conflict with a judicial conference on May 3rd. There were no objections.

6. Other business

Ms. Dupont asked if the committee should do something to update the appellate forms. She said that there are different versions of the forms available in print, online on Westlaw or Lexis, and on the court's website. Ms. Sylvester said that the judicial council has a standing committee on forms that should look into it. Ms. Dupont commented that the forms committee is busy with other matters and that it may be helpful to form a subcommittee to make specific recommendations to pass on to them. Mr. Burke suggested passing on a recommendation to the forms committee to take down outdated forms and he asked Ms. Westby to look at the current forms and report to the committee at a future meeting about what specific recommendations to make. Judge Orme suggested that once the forms are updated they should be made available on the court's website and that all references to the forms in print or online should be updated to refer people to the website.

7. Adjourn

The meeting was adjourned at 1:30 p.m. The next meeting will be held on February 1, 2018.