

MINUTES

Supreme Court's Advisory Committee
on the Rules of Appellate Procedure

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

December 19, 2012

ATTENDEES

Joan Watt - Chair
Judge Fred Voros
Diane Abegglen
Troy Booher
Paul Burke
Marian Decker
Bryan Pattison
Clark Sabey
Ann Marie Taliaferro
Mary Westby

EXCUSED

Judge Gregory Orme
Bridget Romano
Lori Seppi

STAFF

Brent Johnson

GUEST

Tim Shea

I. Welcome and Approval of Minutes

Joan Watt welcomed the committee members to the meeting. Diane Abegglen moved to approve the minutes from the last meeting. Judge Fred Voros seconded the motion. The motion carried unanimously.

II. Overlength Briefs and Death Penalty Brief Word Count

Ms. Watt distributed a proposal to address overlength briefs and to set word count limits for briefs in capital cases. Clark Sabey stated that the Supreme Court wants word count limits. Ms. Watt stated that she has concerns about word count limits and she hopes that the court will still liberally grant extensions in appropriate cases. Judge Voros asked whether the Supreme Court wants limits in capital cases or just death penalty cases. Mr. Sabey stated that he was not certain and, if appropriate, the committee could present two alternatives. Judge Voros asked whether the court wants to allow more pages for post-conviction cases. Mr. Sabey stated that the court wants to allow more pages in both appeals and post-conviction death penalty cases. Mr. Sabey stated that if he had to guess, the court would want word limits in only death penalty cases. Ms. Watt stated that if that were the case then the proposal will need to be revised to make clear that the limits only apply in death penalty cases.

Judge Voros asked about the Attorney General's Office's opinion on the issue. Marian Decker stated that the office is fine with word count limits as long as they only apply to death penalty cases. Judge Voros provided the example of the Lafferty case in which one defendant received the death penalty, but the co-defendant did not. Judge Voros asked whether the co-defendant would be entitled to the additional words because the rule states "death penalty cases." Ms. Watt stated that the co-defendant should not be entitled to the higher word limit, but it may be difficult to craft a rule with that distinction. Ms. Watt stated that the situation would be very rare and that it is probably not necessary to make the distinction in rule. Judge Voros asked whether the committee members are comfortable with double the usual word limit. The committee members agreed with the proposal.

Ms. Watt stated that the proposal on overlength briefs incorporates the concepts previously discussed by the committee. Ms. Watt stated that the proposal makes clear that motions are disfavored, there must be strong justification, and the motion must be filed ahead of the deadline. Judge Voros asked whether "diligence and substantial need" is a high enough standard. Judge Voros noted that the oral argument rule has the standard of "exceptional circumstances." Troy Booher stated that he did not think that it matters because the courts will apply the standards as they deem appropriate in individual cases. Clark Sabey then moved to approve the proposals with the changes that had been made. Paul Burke seconded the motion. The motion carried unanimously.

III. Rule 4(g)

Tim Shea attended the meeting to listen to the committee's discussions on rule 4. Mr. Shea stated that the civil procedure committee had received a directive from the Supreme Court to discuss a rule on reinstating the right to appeal in civil cases. Mr. Shea stated that the Supreme Court is concerned that individuals are losing the right to appeal because the individuals are unaware that a judgment has been entered. Mr. Shea stated that the civil procedure committee has a proposal on addressing when judgments are considered to be entered and their proposal is awaiting the appellate procedure committee's discussions. Ms. Watt noted that this committee had previously expressed a reluctance to change the rule, but if a change is warranted, the committee agreed that changes should be in the appellate rules and not the civil procedure rules.

Judge Voros noted that, prior to State v. Manning, the process in criminal cases was to have the defendant resentenced in order to reinstate the time for appeal. Judge Voros stated that Manning changed the process because resentencing might have occurred much later than the conviction. Mr. Booher stated that the standard in civil cases should be very narrow and tied to failure by the prevailing party to give notice of the judgment, and a lack of effort on the part of the other party. Mr. Shea stated that this will ultimately be an equitable decision by the judge. Judge Voros stated that Manning does not translate well to civil cases because a criminal defendant will know of a judgment. Judge Voros stated that the concern in criminal cases is that a defendant will be incarcerated and not free to follow-up with the attorney or to view the case on-line.

Mr. Shea stated that the focus of any rule should be that the prevailing party did not mail notice of the judgment and the other party did not take reasonable actions to become aware of the judgment. Judge Voros suggested that the focus on the other party's efforts should be that the other party was unable to follow-up for some reason. Mr. Shea stated that the civil procedure committee recommended "due diligence" on the part of the other party.

Mary Westby posed the question of whether there should be a time limit on a party's ability to raise this issue. Ms. Westby stated that if a party receives a proposed order and does not follow-up then the party should not be able to seek an extension after a certain period has passed. Mr. Booher noted that not all orders are prepared by attorneys. Judge Voros stated that in debt collection cases the debtors often are not represented, have limited resources, and lack skills to follow-up on their cases. Mr. Booher suggested that a failure by the prevailing party to comply with rule 58A may be sufficient to reinstate in those cases. Ms. Watt stated that this will encourage parties to comply with rule 58A. Judge Voros stated that, in some cases, they may not know about the judgment until collection efforts have started and that could be years after the judgment is entered because the debtor might have been difficult to locate in the interim. Mr. Shea stated that the civil procedure committee had decided on not putting a time limit in the rule.

Bryan Pattison noted that rule 4(a) states "entry of judgment" and that may need to be changed to "service of the judgment." Mr. Pattison stated that, in his area, judgments are often not mailed by the court and parties might not learn about a judgment for months afterward. Mr. Pattison asked whether the proposal is to set time-frames with exceptions or to change time-frames. Mr. Shea stated that time-frames should be set with exceptions. Mr. Shea stated that the rule should put the burden on the moving party to show the efforts that were made. Ms. Watt summarized the concepts that are needed in the rule: 1) the party did not receive notice and 2) the party did not become aware of the judgment until after the appeal time had expired due to circumstances beyond the party's control. Mr. Booher volunteered to draft a proposal based on those concepts.

IV. Rule 24

Judge Voros stated that he had asked the judges on the two courts for their opinions on where "determinative provisions" should be included. Judge Voros stated that the judges do not have strong opinions. Judge Voros stated that he prefers including them in the addendum because then the judges will always know where to look and competent attorneys will put the determinative provisions in the body of the brief. Ms. Decker suggested that the parties be required to have an index in the addendum listing all of the provisions. Ms. Watt stated that she prefers that the provisions be in the addendum in part so that they do not count against the word limit.

Judge Voros stated that the other proposed change to rule 24 is to reorder paragraph (13). Judge Voros suggested that the order be: 1) the opinion of the Court of Appeals if on certiorari, 2) the order that is being appealed, 3) the constitutional provisions, statutes, rules, and regulations, and 4) other parts of the record. Judge Voros stated that he will present a proposal at the next meeting.

V. Docketing Statements and Rule 5

Ms. Watt stated that these two items will be discussed at the next meeting.

VI. Rule 38B and Rule 11-401

Judge Voros stated that these items are on the agenda strictly for a final vote by the committee. Paul Burke moved to approve the rules. Clark Sabey seconded the motion. The motion carried unanimously.

VII. Rule 44

Judge Voros distributed a proposal to address transfers when a notice of appeal is filed in the wrong court. Judge Voros stated that there has been a general concern about this issue. Mr. Burke stated that there needs to be a provision addressing administrative appeals when they are filed in the Court of Appeals, but should have been filed with the appropriate administrative board. Ann Marie Taliaferro stated that there should also be a provision for justice court appeals that are filed directly in the Court of Appeals. Ms. Watt suggested having language about transferring to the “appropriate court.” Ms. Westby suggested the language: “court of jurisdiction.” Judge Voros suggested the language: “court with subject matter jurisdiction.” Judge Voros stated that he will draft a new proposal with the suggested changes.

VIII. Rule 8A

Clark Sabey distributed a proposal that would address the problem identified in the Snow, Christensen v. Lindberg case. Mr. Booher asked whether the proposal appropriately distinguishes itself from rule 8, which should apply when a party has not yet filed an appeal, but nevertheless needs a stay. Ms. Westby suggested that a party not use rule 8 unless an appeal has been filed. Ms. Watt stated that she has seen rule 8 used in criminal cases before the appeal is filed. Mr. Booher provided an example of an injunction being entered in a case and the party wants to file an interlocutory appeal. Mr. Booher stated that the party may need an immediate stay, but there isn't sufficient time to draft a petition to file at the same time as the request for a stay. Mr. Booher stated that the rule should not preclude this possibility.

Judge Voros stated that these issues often occur in foreclosure cases. Judge Voros suggested that there is a need for a rule directing parties on what to file and when. Ms. Watt suggested that committee members read the Lindberg decision and come to the next meeting prepared to discuss the rule proposal.

IX. Rule 11

Mr. Booher stated that he had looked at the federal rule on this issue and noted that the state rule tracks the federal rule. Mr. Booher stated that federal case law has determined that courts have discretion not to address issues that are raised for the first time in the brief. Mr. Booher stated that he will present a proposal to track the existing practice. Mr. Booher stated that this may include a proposal to eliminate the statement of the issues from rule 11, since parties rarely file these statements.

X. Other Business/Adjourn

The committee scheduled its next meeting for January 23, 2013. The meeting adjourned at 1:40 p.m.