

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

January 23, 2013

ATTENDEES

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

EXCUSED

Judge Gregory Orme
Bridget Romano

STAFF

Brent Johnson

I. Welcome and Approval of Minutes

Joan Watt welcomed the committee members to the meeting. Diane Abegglen moved to approve the minutes from the previous meeting. Mary Westby seconded the motion. The motion carried unanimously.

II. Rule 4

Troy Booher distributed a proposal to address the discussions on reinstating the time to appeal in civil cases. Marian Decker stated that her office would like to see time limits, plus a committee note stating that the amendments supercede State v. Oseguera. Judge Fred Voros stated that he is not convinced that a rule is necessary, but if a rule is necessary this is a good proposal. Ms. Watt stated that a rule will be helpful and suggested that there be a time limit of six months. Ms. Watt stated that six months should be sufficient for an appellant to exercise due diligence. Clark Sabey stated that clerks have resisted taking responsibility for sending notices of judgment because of the burden that creates. Mr. Sabey wondered whether electronic filing would allow clerks to accept this responsibility. Ms. Abegglen stated that in her discussions with others on this issue, clerks will not be assuming this responsibility.

Ann Marie Taliaferro posed the question of whether, if a time limit is imposed, filing a motion within the time limit would be indicative of diligence. Judge Voros stated that this will not automatically show diligence, but allows the party an opportunity to show diligence, which opportunity would not be available if the motion is filed after the time frame. Ms. Decker suggested that the time frame be similar to rule 60(b) of the rules of civil procedure in which motions must be filed within 90 days. Ms. Watt suggested that the time limit be one year, similar to the limitation in habeas cases. Ms. Westby stated that six months seems reasonable. Paul Burke posed the question of whether there is any downside to one year. Judge Voros stated that some judgment creditors might wait six months after a judgment is entered before beginning collection proceedings in order to help make the judgment unassailable.

Ms. Watt asked whether there is a consensus among committee members that there should be a time limit. The committee members agreed that there should be a time limit. Ms. Watt conducted a straw poll and found a split between committee members supporting the six-month limit versus those supporting a one-year limit with some support for 90 days. Mr. Sabey spoke in favor of a six-month limit stating that this promotes finality of judgments. Lori Seppi spoke in favor of a one-year limit stating that the purpose of the change is to protect a very small group of individuals who do not have the sophistication necessary to follow up on these issues and one year will be reasonable to protect this group. Troy Booher noted that a litigant must meet all three criteria in order to have the appeal time extended and if a creditor sends notice of a judgment, verified with a mailing certificate there won't be any problems for the creditor. Mr. Sabey suggested that the rule be published for public comment with the one year time limit as this time limit may result in the most comments both pro and con. Mr. Sabey stated that the committee could adjust the time limit after comments are received.

Mary Westby then moved to approve the proposal incorporating the one year time limit. Judge Voros seconded the motion. The motion carried unanimously. Marian Decker asked whether they would include a committee note on Oseguera. Mr. Booher stated that because Oseguera dealt with rule 60(b) the issues might be different. Ms. Watt stated that the committee members should have an opportunity to read the case before a committee note is considered. Mr. Booher stated that a committee note in the rules of appellate procedure may have little impact on trial courts.

III. Rule 24

Judge Voros distributed proposed changes to rule 24, incorporating discussions from previous meetings. Judge Voros stated that he had changed the order of the addendum as previously discussed. Judge Voros proposed deleting subparagraph (a)(6) and putting those provisions in the description of the addendum. Judge Voros stated that he also included language on word limits in death sentence cases. Mr. Burke asked whether the rule should require the inclusion of all appellate opinions where the case moves back and forth between appellate courts. Judge Voros stated that it may be appropriate to amend the rule to require the inclusion of all opinions. Ms. Taliaferro suggested language to include all prior appellate opinions in a case. Judge Voros

noted that sometimes the opinions in a previous appeal are relevant to the second appeal and maybe those should be included. Mary Westby stated that these situations would be very rare and perhaps it is not necessary to draft a rule for this very small percentage of cases. Mr. Sabey agreed stating that parties are typically able to figure things out in those rare cases and when problems arise it is because people have not read the rules and therefore including a provision may be of little benefit.

Judge Voros raised an additional question involving the statement of the issues. Judge Voros stated that he recently reviewed a case in which the issue statement was so long that he scanned ahead to the headings in the argument section to determine the true nature of the contentions. Judge Voros suggested that a radical approach would be to eliminate the requirement to include a statement of the issues, or perhaps instead change it to “statements of contention,” or “statements of error.” Mr. Sabey stated that he likes the approach of eliminating the requirement. Mr. Sabey noted that he often skips over the statement because the issues are often more succinctly stated later in the brief. Judge Voros stated that he needs to discuss this issue with other judges before the committee considers anything. Ms. Watt stated that she likes the statement of the issues because it helps focus everything at the beginning. Mr. Sabey stated that he sometimes sees that the issues do not match the arguments because the arguments were apparently edited without the drafter going back and reconsidering the statement of the issues. Judge Voros suggested that the issue be discussed at a later meeting. Judge Voros then moved to approve all of the other proposals that he had presented. Marian Decker seconded the motion. The motion carried unanimously. Diane Abbeglen suggested that Judge Voros discuss the issue with the other judges at the May appellate court conference.

IV. Docketing Statement and Rule 5

Ms. Watt stated that these issues will be tabled until the next meeting.

V. Rule 44

Judge Voros stated that the proposal he presented had been rewritten from a previous proposal. Judge Voros stated that Judge Orme had expressed concerns about problems that may arise if clerks fail to take timely action in sending documents to the appropriate court. Ms. Westby stated that this is more of an issue when a notice should have been filed in the district court because the appellate court clerks will ensure that the notice ends up with the appropriate appellate court. Ms. Westby stated that if a notice should have been filed in the district court they send a notice to the appellant that the court is sending the filing to the district court, but that the court makes no representations on whether the filing is timely. Ms. Watt stated that her office has filed Manning motions on these cases when the notices were submitted late to the district court. Ms. Watt stated those motions have always been granted.

Mr. Sabey stated that the language in the last sentence is problematic because the appellate courts are transferring the case to the appropriate appellate court with the original filing date. Judge

Voros asked whether that is appropriate policy. Mr. Sabey stated that sometimes determining the correct court can be difficult for litigants and therefore the clerks give some leeway. Ms. Watt noted that the language in rule 5 also doesn't match up with the appellate courts' practices. Ms. Westby stated that, because the clerks work from the same counter, they just bounce the notice to the correct court because it is often simply an issue of correct captioning on the pleading. Mr. Sabey stated that it is sometimes a judgment call on the part of the clerk as to which court should receive the filing and if errors are made they ensure that the filing ends up in the appropriate court, without consequence.

Mr. Booher suggested that the notice of appeal should not be filed in the district court, because delay often happens between the trial court and appellate court. Ms. Westby noted that it is easier for litigants in rural areas to file the notice in the district court. Mr. Booher asked what the impact might be when electronic filing goes into effect. Ms. Abegglen stated that e-filing in appellate courts is a few years away. Ms. Watt expressed concern about the use of the phrase "appropriate court." Ms. Watt suggested that the language should be "court with jurisdiction." Mr. Booher suggested that a rule may not be necessary because it is apparent that there are practices in place and there does not seem to have been any problems. Judge Voros stated that he will discuss this issue with the clerks and bring the issue back at the next meeting.

VI. Rule 8A

Mr. Sabey distributed a copy of the Lindberg case and stated that the issue should be discussed at the next meeting.

VII. Rule 23B Subcommittee Update

Ms. Watt stated that the subcommittee had not recently met and therefore there was nothing to report. Ms. Watt stated that the subcommittee would be meeting within the week.

VIII. Juvenile Record on Appeal

Mr. Burke stated that his subcommittee had forwarded options to the Supreme Court and those are apparently under consideration. Ms. Abegglen stated that the issue may have become dormant and she will follow up to determine the status.

IX. Other Business/Adjourn

Ms. Watt stated that rule 11 will be discussed next meeting. Ms. Watt stated that rule 14 should also be added to the agenda. Marian Decker stated that she has a proposal on rule 27 to change the brief cover requirements on where the case number should be placed. The committee scheduled its next meeting for February 20, 2013. The meeting adjourned at 1:30 p.m.