

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

Education Room
Thursday, November 14, 2013
12:00 p.m. to 1:30 p.m.

PRESENT

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

EXCUSED

Judge Gregory Orme

1. Welcome and Approval of Minutes

Joan Watt

Ms. Watt welcomed the committee to the meeting. Ms. Watt suggested that the minutes from the September 25, 2013 meeting be amended on page 4, the 4th paragraph from the bottom to read “an issue” instead of “a issue”. She also suggested that the sentence in paragraph two attributed to her be deleted, since it does not reflect what she meant.

Mr. Burke moved to approve the minutes from the September 25, 2013 meeting as amended. Ms. Seppi seconded the motion and it passed unanimously.

2. Public Comment to Proposed Rules 29 and 11

Joan Watt

The committee discussed the public comments made to proposed rule 11. Ms. Watt stated that the first comment was favorable. She said that the second comment discussed “who pays”, which is something that the committee discussed and decided to leave. Ms. Watt stated she recalled the committee previously discussing that the appellee can make the decision not to supplement the record,

and hope that the Court says that because the information is not there the appellant loses, or the appellee can choose to supplement the record. She said the discussion was to leave the rule as is.

Ms. Decker stated that she thinks the comment is wrong regarding the appellee's burden. Mr. Booher stated that he thinks the commenter is referring to the last sentence. He said that in the civil world, the appellee would see the statement of the issues and would say we might need these additional transcripts and would tell the appellant to pay for them. The appellate court would remand the issue to the trial court and the trial court would decide who pays for the transcripts. If the appellee decides the transcript needs to be ordered, the presumption in the rule is that the appellee would pay for it. He stated that if you point out a mechanism you have increased the chances that the mechanism will be invoked.

Ms. Decker moved to send rule 11 as written to the Supreme Court for approval. Mr. Sabey seconded the motion and it passed unanimously.

The committee discussed the public comments to rule 29. Ms. Watt stated that these comments were previously discussed. She stated with all due respect to the Attorney General's comments, these issues were already discussed. Ms. Decker stated that she agrees with the comments. Judge Voros stated that the Court has discretion to hear surrebuttal.

Mr. Booher moved to send rule 29 as written to the Supreme Court for approval. Ms. Seppi seconded the motion and it passed with Ms. Decker abstaining.

3. Proposed Language Addressing Addendums to Appellate Briefs (Rules 24, 58, and 27)

Alison Adams-Perlac

Ms. Adams-Perlac discussed the proposed changes to rules 24, 58, and 57 requiring an addendum for non-public records. She stated that they should be called "non-public" addenda. Mr. Sabey expressed his concern that the color of the non-public addenda being different from the original brief because it could be confusing for the judges. Ms. Adams-Perlac stated that the different color was suggested to assist clerical staff in identifying non-public addenda. Judge Voros stated that he agrees that a different color should be used for non-public addenda.

Judge Voros stated that requiring a statement that a non-public addenda is unnecessary is a bit too onerous for individuals who do not have to submit a non-public addenda. Ms. Watt suggested requiring a statement only when a non-public addenda is included.

The committee discussed changing the color to pink instead of purple.

Mr. Booher moved to approve the rules as amended and discussed. Judge Voros seconded the motion and it passed unanimously. Ms. Adams-Perlac will send a copy of the proposal with amendments to the committee.

4. Rule 4(e)

Judge Fred Voros

Judge Voros discussed his proposal on rule 4(e). He stated that it incorporates part of the Court of Appeals' reasoning in *Bennett vs. Bigelow and BOP*, 2013 UT App 180. He stated that the issue on appeal was in determining if there was good cause for extending the time for an appeal whether the trial court should look at whether an appellant had availed itself of filing a notice of appeal before final judgment was entered. The argument was that they did not exert reasonable efforts because they did not pre-file a notice of appeal. The Court said if they accepted that argument, they would be implying that litigants have a duty to file a premature notice of appeal or risk losing the relief available under rule 4(e). He stated that the proposal makes the Court's reasoning explicit. He stated that it goes further than the

opinion because the opinion says that it is not dispositive, but it is a factor the district court could consider.

Ms. Watt stated that it seems relevant if the opposite happens, if you do file a premature notice, if you filed an early one, and it did not have the effect of preserving your appeal rights. Mr. Sabey stated that it could be reworded to say “failure to file”. Mr. Burke stated that using “failure” makes it sound like a requirement.

The committee agreed that trying and failing should count in favor of good cause, although they could not agree on the language.

Judge Voros moved to approve the proposal as amended to state that non-filing of a 4(c) motion is not relevant to a determination of excusable neglect for good cause under 4(e). Mr. Burke seconded the motion and it passed unanimously. Judge Voros will rework the language and send it to Ms. Adams-Perlac to circulate by email.

5. Revised Rule 24 “Nature of the Case” Language

Troy Booher

Mr. Booher discussed changing rule 24 to allow parties to include an introduction. He stated that there are advantages to the reader and to the writer. He stated that writing it helps you frame the issues. He said it gives the reader an overview. He stated introductions are used in federal briefs, but the federal rules do not provide for it. Ms. Watt stated that she has reviewed briefs with introductions and has found the introductions to be helpful. However, she stated that she is concerned about introductions increasing the word limit. She stated that she thinks our rules allow for an introduction, but including it in rule 24 would make it a requirement, and that requirement could be overwhelming. Ms. Decker stated that she shares Ms. Watt’s concerns.

Ms. Westby stated that she is not concerned if we call “nature of the case” “introduction,” but they need the specific information the nature of the case can provide. Mr. Parker stated that the introductions he is familiar with are very repetitive.

Judge Voros stated that in many briefs it takes a long time to get to the point. Mr. Parker stated that some introductions are so lengthy that they require a response. Mr. Booher stated that there are problems with the antiquated format of the briefs. Judge Voros stated that he agrees and said that he would delete the “statement of the issue” if we were starting from scratch. He stated that if you have a table of contents, a statement of the issues section is unnecessary.

Ms. Westby stated that judges vary greatly in where they first turn in the brief. If we change the format of the briefs, it will change the format of how judges read them, but she expressed concern that it would be a major overhaul of the rule.

Ms. Watt stated that we may want to look at the form of briefs in the future, but we should discuss the issue with the judges before revising it. Ms. Watt suggested keeping the rule as written, and committee members can think about how the language providing for an introduction should be worded. She also stated that an introduction should be discretionary.

Mr. Booher stated that the appellate judges should consider the form of briefs at the next appellate conference. Ms. Westby asked whether the requirements for briefing change in a paperless world.

Judge Voros asked whether anyone would be willing to discuss this issue at the next appellate conference. Mr. Booher and Mr. Burke volunteered.

The committee agreed that no changes to rule 24 were necessary at this time.

6. Global Review of Rules Update

Troy Booher

Mr. Booher discussed the goals of the Global Review subcommittee including consistency and clearing up some ideas that need more clarity. He stated that another goal is to add standing orders into the rules. Judge Voros asked if there are any standing orders that should not be incorporated into the rules. He stated that standing orders that address practice should be incorporated into the rules because the Utah Constitution says the Supreme Court shall govern by rule. Ms. Watt suggested that the committee address the current proposals and then consider standing orders later.

Mr. Booher discussed proposed changes to rule 4(d). He stated that the purpose of the change was ambiguity since the current rule is not clear as to which court applies for purposes of the notice of appeal being docketed. He stated that it could be interpreted to mean the trial court or the appellate court.

Judge Voros moved to approve the change to rule 4(d). Ms. Watt seconded the motion and it passed unanimously.

Mr. Burke discussed proposed changes to rule 4(e). He expressed concern with the use of “ex parte” in the current rule. He stated that he would rework the proposal so that the second sentence comes first in the paragraph. Judge Voros stated that he thinks 4(e) is written backwards. Judge Voros stated that he is, however, hesitant to change rule 4(e) because of the appellate opinions that have been issued involving 4(e). Mr. Sabey suggested leaving the proposal as it is written.

Mr. Burke stated that the subcommittee started with the narrow issue of addressing the ex parte language. Mr. Sabey suggested being more explicit about stating that the trial court may rule without considering a response. Judge Voros asked whether there is a provision for a response or whether it is the motion rule that applies. Mr. Burke stated it is the motion rule that applies. He states that these motions are filed most often when a party is deciding whether to pursue the appeal or for settlement negotiations.

Mr. Parker stated that the way it is written it invites litigation that will not be resolved in the first or second 30 days. Mr. Burke stated that the “ex parte” process in the current rule is concerning. Mr. Pattison stated that with e-filing nothing is really ex parte, because everyone gets notice. Mr. Booher stated that the term “ex parte” is misleading, because everyone is aware and gets notice, but the other party does not have an opportunity to respond.

Mr. Sabey stated that the case law places more emphasis on excusable neglect with respect to after the prescribed time and good cause before that time. Mr. Burke agreed.

Ms. Watt suggested that Mr. Burke revise the proposal based on the committee’s agreement that the ex parte language should be removed, and that a judge can rule without a response. She also suggested that it include good cause and excusable neglect in the second thirty days, but only good cause in the first 30 days. Judge Voros suggested that Mr. Burke research whether this rule tracks the federal rule.

Mr. Burke will revise the proposal for discussion at the next meeting. He will see if it tracks the federal rule.

Mr. Booher discussed proposed rule 5(d). He stated that “appendix” should be probably be changed to “addenda”. Judge Voros stated that it should be “addenda”. Mr. Sabey suggested “any addenda”. Mr. Burke stated that, “if any” is unnecessary. Mr. Parker suggested stating “not to exceed 20 pages” instead of “as short as possible.” Ms. Watt stated that she agreed, as otherwise the rule suggests that it is negative if a person uses all 20 pages. Ms. Westby agreed, but said she does not want anyone to feel compelled to take 20 pages.

Judge Voros asked whether it is worth giving guidance on what should be included in the addenda. Mr. Parker asked how much access the appellate court has to the underlying case. Mr. Sabey stated that if the case is electronically filed, they can access it, although it is a judge is more likely to

review the information in an addendum than to read it online. Judge Voros stated that the addenda can be quite large. Mr. Parker asked how the addenda can be constructed to make it more easy for the judge to find the relevant information.

Ms. Watt stated that with addenda on interlocutory appeal, practitioners include everything to show the court that these things actually happened because there is no transcript. She suggested clarifying what would be helpful to include in an addenda. Mr. Sabey stated that he would want the Supreme Court to look at the rule before we approve it.

Ms. Watt stated that we may want to hold off on addressing what is included in addenda because electronic records may change everything. Mr. Sabey stated that the committee should go with the current proposal with a view toward changing it as the electronic record allows.

Proposed rule 5(d) was revised as follows:

(d) Page limitation. A petition for permission to appeal may not exceed 20 pages, excluding the table of contents and any addenda.

Mr. Sabey moved to approve rule 5(d) as amended. Mr. Burke seconded the motion and it passed unanimously.

Mr. Booher stated that the top part of 5(f) was previously addressed with Ms. Romano's proposal. That proposal was addressed and approved at a previous meeting. He stated that Ms. Westby suggested that a reply is not helpful in this instance, so the proposal provides that a reply shall not be permitted.

He stated that these petitions can delay a case for three months. Mr. Sabey stated that most of the time no concurrence will be filed.

This proposal was tabled until the next meeting.

7. Other Business

Ms. Watt stated that she would like the committee to discuss rule 37(b) at an upcoming meeting, specifically with regard to the requirement that there be a motion to dismiss accompanied by an affidavit from the client voluntarily dismissing the appeal if all issues are moot.

8. Adjourn

Mr. Booher moved to adjourn the meeting. Mr. Burke seconded the motion, and it passed unanimously.