

MINUTES

Appellate Committee
on Procedure

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

October 20, 2010

ATTENDEES

Judge Gregory Orme
Judge Kate Toomey
Judge Fred Voros
Diane Abegglen
Tawni Anderson
Marian Decker
Jennifer Gowans
Larry Jenkins
Bryan Pattison
Clark Sabey
Joan Watt

EXCUSED

Paul Burke

STAFF

Brent Johnson

I. WELCOME AND APPROVAL OF MINUTES

Joan Watt welcomed the committee members to the meeting. Ms. Watt suggested a change to the minutes from the August meeting. Ms. Watt clarified that the committee had voted to repeal Rule 23B and the Committee is not deferring to the Appellate Representation Task Force. Ms. Watt stated that the committee is simply holding the repeal until the Task Force takes final action. With that change, Judge Kate Toomey moved to approve the minutes. Clark Sabey seconded the motion. The motion carried unanimously. The committee also reviewed the minutes from the May meeting, which had not yet been approved. Tawni Anderson moved to approve those minutes. Judge Gregory Orme seconded the motion. The motion carried unanimously.

II. SCOPE OF REPRESENTATION

Joan Watt distributed proposed amendments to Rule 38B. The amendments will define the scope of representation that must be provided by appointed counsel. Ms. Watt stated that the Appellate Representation Task Force is completely revising Rule 38B and this proposal will be tied into that work. Judge Fred Voros stated that the Task Force should have its work in this area

done by January. Ms. Watt noted that the proposal includes a requirement to file a petition for writ of certiorari with the U.S. Supreme Court, if such a petition is warranted and includes a requirement to respond to any such petition filed by the State. Ms. Watt also stated that the rule addresses termination of parental rights cases.

Judge Orme noted that, in juvenile court cases, trial counsel must file a notice of appeal within 15 days and thus trial counsel has some appellate responsibilities in juvenile cases. Judge Voros asked whether including trial court counsel in the rule would create confusion when counties split their contracts between trial counsel and appellate counsel. Jennifer Gowans suggested that the counties will resolve these issues contractually.

Clark Sabey asked why there is a reference to Rule 19, but not to Rule 5. Ms. Watt stated that, in her office, the trial attorneys prepare and file petitions for interlocutory appeal and then if a petition is granted, the appellate attorneys will handle the case. Judge Voros noted that Utah Code § 77-18a-1 includes interlocutory appeals and the statute's inclusion in the rule will cover those situations.

Judge Toomey asked whether including petitions for writs of certiorari to the U.S. Supreme Court might result in more clients demanding such petitions. Ms. Watt stated that perhaps the language on writ petitions to the U.S. Supreme Court should be omitted from the rule. Judge Voros stated that some indigent defense contracts might be based on the amount of work done, and the rule may create some incentive for counsel to file petitions to the U.S. Supreme Court just so that they can earn more money. Judge Voros suggested taking the proposal to the Appellate Representation Task Force to obtain county input. Judge Orme suggested tabling the proposal until the Task Force completes its work. Mr. Sabey noted that the two appellate courts have already issued letters on the scope of representation and those could be relied upon for the time being. Judge Toomey suggested that the proposal be tabled until after the first of the year. The committee members agreed. Ms. Watt stated that she will revise the rule based on the committee's suggestions and bring the proposal back to the committee in January.

III. E-FILING SUBCOMMITTEE

Judge Toomey stated that her subcommittee met in September. Judge Toomey stated that the Board of Appellate Court Judges has formed its own committee to review e-filing. Judge Toomey stated that she has been invited to sit on that committee and therefore there does not appear to be anything for the subcommittee to do for the time being. The committee agreed with this assessment and will set the issue aside pending work from the Board of Appellate Court Judges' committee.

IV. WORD COUNT RULE

Larry Jenkins distributed a proposed rule to implement a word count limit rather than a page limit for briefs. Mr. Jenkins stated that he followed the federal standard. Mr. Jenkins noted that the federal rule provides for additional words on cross-appeals. Judge Toomey noted that the current Utah rule results in motions for more pages on cross-appeals. Judge Toomey suggested that the word count be increased for cross-appeals, to reduce the number of motions. Mr. Jenkins stated that the federal courts put cross-appeal requirements in a separate rule, but suggested that cross-appeals could be addressed in the same rule.

Judge Voros stated that the Board of Appellate Court Judges is in favor of a word count rule, along with 14-point type and eliminating garamond as a font option. Mr. Jenkins stated that he will revise the rule to address cross-appeals and he will bring the proposal back in January. Judge Toomey stated that, if cross appeals are addressed in the rule, the rule should make it more difficult to obtain permission for over-length briefs in cross-appeal cases. Mr. Jenkins stated that he will review the federal rule on requesting over-length briefs.

V. RULE 9(c)(4)

Judge Voros noted that this rule contains a typographical error in that the reference to Rule 4(f) should actually be to Rule 4(g). Judge Voros moved to amend the rule and the motion carried unanimously.

VI. RULE 42(f)

Judge Voros submitted a proposal to eliminate subparagraph (f) from Rule 42. Judge Voros stated that the rule does not reflect the practice of the courts, because sometimes the Supreme Court will recall a pour-over but not on jurisdictional grounds. Judge Voros also noted that the parties are not involved in any way. Therefore, there is no need to address this in the rule. Mr. Sabey suggested that the committee just eliminate the reference to jurisdictional grounds. Judge Voros stated that transfer orders aren't really final and therefore the rule should not contain this subparagraph. Larry Jenkins moved to eliminate subparagraph (f) from Rule 42. Tawni Anderson seconded the motion. The motion carried unanimously.

VII. OTHER BUSINESS/ADJOURN

The committee did not have any other business to discuss. The committee meeting adjourned at 1:15 p.m. The next meeting will be January 19th at noon.