

MINUTES

Appellate Committee  
on Procedure

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

January 19, 2011

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. The committee made a few changes to the minutes from the last meeting. With those changes, Tawni Anderson moved to approve the minutes. Judge Kate Toomey seconded the motion. The motion carried unanimously.

**II. Word Count Rule**

Larry Jenkins presented a revised proposal for a word count rule. Mr. Jenkins stated that he tested the 14,000 word count and it was close to the 50 pages that is the current standard. Mr. Jenkins stated that there will now be more pages with the larger font, but the number of words will be the same as the current practice. Mr. Jenkins stated that he did not change the language on requests for over-length briefs. Ms. Watt asked whether the rule is consistent with the federal rule. Mr. Jenkins stated that it is.

Judge Fred Voros asked whether the provisions on cross-appeals are about the same as the current provisions. Mr. Jenkins stated that he followed the federal rule and so they are a bit different. Clark Sabey stated that this will expand the size of certain briefs on cross-appeals but that will be fairer to the parties. Judge Voros suggested that there be more words for the appellee on the cross-appeal. Mr. Sabey stated that an increase would be fine, but the proposal still provides more argument than the current rule. Judge Toomey stated that the issues are often so intertwined that there would be a lot of duplication that would not need to be included. Judge Voros stated that the cross-appeal is often a minor issue in relation to the first appeal and therefore additional words might not be necessary. Mr. Sabey stated that sometimes the cross-appeal involves a substantial issue because the party with the insubstantial issue was able to file the appeal first. Mr. Sabey noted that parties will still be able to ask for over-length briefs. Mr. Sabey stated that it is rarely an issue. Bryan Pattison noted that the federal rule allows for 16,500 words but it does not state when the federal courts adopted this provision. Judge Toomey stated that the committee should adopt the rule and if changes are needed later, the committee can revisit the word count.

Ms. Watt noted that the proposal reduces the number of pages for individuals who will not use the word count. Mr. Pattison stated that is consistent with the federal rule. Judge Voros stated that the rule should encourage people to use the word count and therefore the rule should be reorganized to state the word count limits first, and then to state the page limits. The committee members agreed that the order of the rule should be changed. Jennifer Gowans stated that word processing programs count words differently. Marian Decker stated that her office often eliminates some periods and spaces in their briefs to ensure that the word processing program is counting fewer words. Mr. Sabey noted that the proposal follows the federal rule and it apparently has not been an issue. Ms. Anderson stated that the attorney, in the attorney certification, could name the word processing system used. Mr. Sabey stated that the courts will ultimately not be concerned about minor variations. Mr. Jenkins stated that he will revise the order of the rule and then distribute the proposal by email for a final vote.

### **III. Scope of Representation**

Ms. Watt stated that the committee members' concerns at the last meeting were petitions for certiorari to the U.S. Supreme Court. Ms. Watt stated that her office has occasionally done those, but only in capital cases and usually in response to a State petition. Ms. Watt stated that her office does not do these as a part of their standard representation. Ms. Watt suggested that the rule could include language which states that certiorari should be filed if the attorney believes it is warranted. Ms. Watt stated that if there is an issue that has merit, indigent defendants should have representation. Ms. Watt stated that, at the last meeting, it appeared as if everyone agreed that representation should be provided through certiorari to the Utah Supreme Court. Judge Voros noted that the proposal goes beyond what the statute provides, but that it is consistent with the letters that were issued by the appellate courts.

Mr. Sabey questioned whether the rule might be beyond the scope of current rules. Judge Toomey suggested that it is. Ms. Watt stated that if an indigent has an important issue to take to the U.S. Supreme Court there usually isn't a problem getting someone to take the case pro bono because there are always attorneys who want to argue those important issues before the Supreme Court. The committee members agreed that the language on certiorari to the U.S. Supreme Court should be removed.

Mr. Sabey stated that he still questioned including Rule 19 petitions in the rule. Ms. Watt stated that it is because sometimes there are very important issues that need to be addressed, but there is no right to appeal. Ms. Watt stated that this is sometimes the situation with justice court issues. Judge Orme questioned whether the language is too open-ended and that maybe it should be qualified in some way, such as stating that petitions should be filed when it is necessary to vindicate appellate rights. Jennifer Gowans stated that it should be open-ended or the practice would get into too much hair-splitting. Mr. Sabey stated that Rule 19 petitions are the most abused, although usually only by pro se individuals. Mr. Sabey stated that perhaps it won't be an issue because it would only be for represented indigents. Judge Voros noted that justice court issues are infrequent. Judge Orme stated that the committee can revisit the issue if problems arise.

Judge Toomey suggested that the provision be removed from the rule because it is only being used in exceptional cases, and eliminating it from the rule would not change that. Ms. Watt stated that it is a problem in some cases, but that she could go either way on whether it is in the rule. Judge Toomey expressed the concern that putting it in the rule might increase the number of petitions. Judge Voros stated that the impetus for the proposal was to address certiorari petitions and he was not aware of any problems with extraordinary writs. Judge Voros noted, however, that if the State files a petition, the attorney should be required to file a response. Judge Voros stated that qualifying language might be helpful.

Mr. Sabey asked what would happen if an attorney files a petition, and the court says it is frivolous, but the attorney is still paid for the work. Judge Voros stated that the Task Force on Appellate Representation's proposal in this area might resolve that, because only certified attorneys will be able to practice in this area and if an attorney files frivolous pleadings, the attorney will ultimately be removed from the certification roster.

Judge Voros moved to approve the proposal as amended leaving in Rule 19. Tawni Anderson seconded the motion. The motion carried unanimously.

The committee then discussed whether the proposal should be a separate rule or included with Rule 38B. Judge Toomey stated that it would fit in Rule 38B and the title of the rule could be changed to Qualifications and Duties for Appointed Appellate Counsel. Ms. Watt noted that she had removed the phrase "appellate counsel" from the rule because trial counsel may have duties in some circumstances. Judge Voros stated that removing that language could

suggest to trial counsel that they must take the case all the way through certiorari. Judge Toomey moved to include the proposal in Rule 38B. Judge Voros seconded the motion. The motion carried unanimously.

Judge Voros then stated that the committee needed to review the committee note to see if it was consistent with the changes that had just been made. Clark Sabey suggested removing the last sentence in the committee note. Judge Voros moved to drop the last sentence. Larry Jenkins seconded the motion. The motion carried unanimously.

#### **IV. Other Business/Adjourn**

The committee did not have any other business to discuss. The meeting adjourned at 1:20 p.m. The next meeting will be April 27 at noon.